No. 99-697-CSX Title: Claude Lambert, et ux., Petitioners
v.
City and County of San Francisco, et al.

Docketed: October 26, 1999 Court: Court of Appeal of California, First Appellate District

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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

CLAUDE LAMBERT and MICHELINE LAMBERT,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on Behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING; SAN FRANCISCO CITY ZONING ADMINISTRATOR; and BOARD OF PERMIT APPEALS,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court ruled that an exaction imposed as a condition to the granting of a discretionary land use permit is subject to heightened judicial scrutiny to determine whether the exaction substantially advances a legitimate state interest. *Id.* at 834 n.3. This case presents the question of whether *Nollan's* heightened scrutiny is also triggered when a development permit is *denied*, following the landowners' refusal to comply with a demand for a cash payment of $600,000 in exchange for the permit.

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Petitioners Claude and Micheline Lambert respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in the above-entitled proceeding on September 23, 1997.

OPINIONS BELOW

The decision of the California Court of Appeal, formerly reported at 57 Cal. App. 4th 1172 (1997), is reproduced as Appendix (App.) A to this petition. The Judgment for the City and County of San Francisco (City) entered by the San Francisco Superior Court is unreported and is reproduced as Appendix D.

JURISDICTION

The opinion of the California Court of Appeal that is the subject of this petition was filed and entered on September 23, 1997. App. A. The court of appeal considered and decided the question of whether the City's denial of a conditional use permit constituted an uncompensated regulatory taking of the Lamberts' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The California Supreme Court granted the Lamberts' petition for review on January 14, 1998 (App. C) but dismissed its order granting review on July 28, 1999 (App. B). This petition for writ of certiorari has been timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "private property [shall not] be taken for public use, without just compensation."

Pertinent portions of the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (Hotel Conversion

Ordinance or HCO), San Francisco Administrative Code Chapter 41, are reproduced at Appendix G.

STATEMENT OF THE CASE

Appellants Claude and Micheline Lambert (Lamberts) challenge the constitutionality of a denial by the City and County of San Francisco of a permit to offer vacant rooms to rent in their property, the Cornell Hotel. The City's denial followed the Lamberts' refusal to comply with a demand for a cash payment of $600,000 in exchange for the permit.

This Court has long required heightened judicial scrutiny of individualized exactions demanded as conditions to the issuance of discretionary land use permits. Under *Nollan v. California Coastal Commission*, 483 U.S. 825, such exactions must bear an essential nexus to the achievement of a legitimate regulatory objective. *Id.* at 837. This requirement of heightened judicial scrutiny applies not just to exactions of real property but also to demands for monetary payments in exchange for discretionary development permits.[1]

In the proceedings below, neither the City nor the courts asserted that the City's proposed $600,000 exaction would have been found constitutional under *Nollan*. Instead, the court of appeal held that *Nollan's* heightened scrutiny is not applicable when a permit is *denied* for nonpayment of the suspect fee. App. A-10-12. As Presiding Justice Strankman observed in dissent, this holding presents this Court

> with a critical legal question: is heightened scrutiny triggered when a government entity denies a permit when a condition is not met, rather than granting the permit with a condition?

App. A-19-20 (Strankman, P.J., dissenting).

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[1] *See, e.g., Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 859-63 (1996).

A. The Cornell Hotel and the Hotel Conversion Ordinance

In 1978 Claude and Micheline Lambert purchased the Cornell Hotel, a 58-room Victorian hotel in the City of San Francisco.[2] Three years later, the City adopted the Residential Hotel Unit Conversion and Demolition Ordinance. Under the HCO, 31 of the Cornell's 58 rooms were classified as "residential"--*i.e.*, rooms which had been rented to the same guest for more than 32 days, based on a survey of room usage as of September 23, 1979.[3] Most of the so-called "residential" guests at the Cornell Hotel at that time were in fact foreign exchange students and visiting businessmen.[4]

The City applies the HCO to maintain the same distribution of "residential" and "tourist" rooms that existed at the time of their initial designation in 1979.[5] If a room had been rented to the same guest for more than 32 days 20 years ago, it cannot be rented to an overnight visitor today without obtaining a "conversion" permit from the City.[6] As a condition to issuing these permits, the City demands cash payments equal to 40% of the appraised replacement value of the rooms.[7] Although the supposed rationale for the HCO is to force a small group of owners to maintain a stock of "affordable" housing for

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[2] Court of Appeal Appellants' Appendix (AA) at 253.

[3] *Id.*

[4] *Id.* at 257.

[5] *Id.* at 93.

[6] HCO § 41.12, App. G-2-3.

[7] Applicants are given the dubious option of actually building new rooms and giving them to the City instead of paying the fee. HCO § 41.12-41.13, App. G-3-6. Since the events recounted in this petition, the exaction has been doubled to 80% of the appraised value of the rooms in question. App. A-14.

the benefit of the City, a large proportion of the so-called "residential" rooms are in fact vacant. Data reported by the City show that in 1994 there were over 5,000 vacant "residential" rooms in the 528 small hotels that are subject to the HCO.[8] This corresponds to the situation at the Cornell, where all 31 of the rooms designated by the City as "residential" are vacant.[9] Thus, the actual effect of the City's enforcement of the HCO is to exact payments from the owners of these 528 properties in exchange for allowing them to rent out their vacant rooms. This scheme has been aptly described as "ransom" by the court of appeal.[10]

In 1993, a federal court ruled that the HCO effected an unconstitutional taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[11] The City responded that it was not bound by decisions of the federal courts and would continue enforcing the HCO.[12] To help insulate the regulations and their controversial buyout provision from further constitutional scrutiny, however, the City

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[8] AA at 495.

[9] *Id.* at 253.

[10] *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1101 (1990). Interestingly, "ransom" is the same term used by the New York Court of Appeal in describing the buyout provision of a substantially identical New York City regulation. *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1070 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

[11] *Golden Gate Hotel Association v. City and County of San Francisco*, 836 F. Supp. 707 (N.D. Cal. 1993), *rev'd on other grounds*, 18 F.3d 1482 (9th Cir. 1994).

[12] *See Residency Hotel Rule for S.F. Put on Hold: City Attorney Says U.S. Judge's Verdict Isn't Binding*, S.F. Examiner, July 1, 1993, at A9 (1993 WL 8579073).

proceeded to bootstrap the provisions of the HCO into its planning code. Hotel owners wishing to rent out their vacant "residential" rooms are now required to obtain a conditional use permit from the City's planning commission. Nevertheless, the legal fiction that vacant hotel rooms require "converting" before they can be rented to tourists stems entirely from the HCO.

B. The City Tries to Exact $600,000 from the Lamberts in Exchange for Permission to Rent Out Vacant Rooms in the Cornell

In May of 1990, the Lamberts applied for a permit to offer the Cornell's "residential" rooms for rent to overnight guests.[13] Shortly thereafter, the City informed the Lamberts that they were required to obtain a conditional use permit from the planning commission in order to rent out their rooms.[14] While the Lamberts pursued this application, the City obtained two appraisals of their hotel.[15]

The planning commission conducted public hearings on the Lamberts' application in early 1994.[16] At the first of these hearings, the City's staff reported that the commission had complete discretion to respond to the Lamberts' application in any of six ways--from simply granting the permit through demanding various types and levels of exactions. Denying the application outright was not an option under consideration.[17]

Based on the appraisals it had conducted of the Cornell, the City advised the Lamberts that $600,000 would be an

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[13] AA at 257.

[14] *Id.*

[15] *Id.* at 90.

[16] *Id.* at 97.

[17] *Id.* at 203-04.

"appropriate" payment under the HCO to allow the Lamberts to rent out their vacant rooms.[18] The Lamberts countered with an offer of $100,000 for issuance of the required permit, but the City responded that this amount would not be "sufficient" consideration.[19] The City invited the Lamberts to engage in further monetary negotiations for the permit and subsequently cited the Lamberts' refusal to engage in further haggling as evidence supporting the denial of their application.[20]

Although the HCO buyout fee is statutorily defined as 40% (now 80%) of the appraised value of the rooms to be rented out, the City recognizes that the actual amount of the fee to be imposed in any given case is nearly infinitely variable and completely subject to the City's discretion. The City's determination that $600,000 would be the "most appropriate" price for the Lamberts' permit was based on two wildly disparate appraisals, one of which would have supported a fee of $488,584 and the other of $612,887.[21] When the Lamberts refused to pay $600,000 for the permit, the City invited them to submit a lower appraisal--which would be tantamount to offering to pay a lower fee.[22] Only when it became clear that the Lamberts would not budge from their $100,000 counteroffer did the City stop haggling over the price of the permit and deny the Lamberts' application altogether.

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[18] *Id.* at 91.

[19] *Id.* at 100, 102.

[20] *Id.* at 344-45.

[21] *Id.* at 90-91.

[22] The City's invitation to haggle over the amount of the mitigation fee--and the Lamberts' refusal to engage in further bargaining--was actually cited by the City in its statement of undisputed facts in support of its motion for summary judgment in the trial court. *See* AA at 344-45.

C. When the Lamberts Decline to Pay $600,000 to Ransom Their Rooms, the City Denies Their Permit Application

On March 17, 1994, the City denied the Lamberts' application for a conditional use permit.[23] In its findings, the City acknowledged that no long-term residents would be displaced by granting the permit[24] and that rooms in the Cornell could not rationally be described as part of the City's stock of "affordable housing."[25] (These considerations provide the basic rationale for demanding replacement housing or buyout fees under the HCO.)[26] Nevertheless, the commission also recited the $600,000 fee that it had demanded[27] and the "insufficiency" of the Lamberts' $100,000 counteroffer.[28] Making its point even clearer, the City cited two other nearby hotels that had received identical permits in exchange for payments of $10,000 to $15,000 per room--considerably more than the Lamberts' offer of less than $5,000 per room.[29]

Finally, having documented its failed attempt to obtain a sufficiently large cash payment to induce it to grant the

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[23] *Id.* at 97-105.

[24] Only 2 of the Cornell's 58 rooms were occupied by long-term residents at the time of the application, and the Lamberts had offered lifetime leases to both of them. *Id.* at 98. There are currently no long-term residents at the Cornell. *Id.* at 253.

[25] The commission found that rents at the Cornell Hotel ranged from $1,100 to $1,300 per month for single-occupancy and $1,600 or more per month for double-occupancy rooms. *Id.* at 98.

[26] HCO § 41.2, App. G-1-2.

[27] AA at 100.

[28] *Id.* at 102.

[29] *Id.*

Lamberts' permit, the City invoked standard boilerplate rationalizations for its denial: renting out the Cornell's vacant rooms would allegedly be incompatible with the neighborhood;[30] would not be consistent with the master plan;[31] and would be injurious to "the health, safety, and welfare of the City."[32] Nothing in the commission's findings indicates how a cash payment of $600,000 would have cured these supposed defects, although the record is absolutely clear that such a payment would have secured the issuance of the permit.[33]

D. The Lower Courts Decline to Apply This Court's *Nollan* Standard to the City's Actions

The Lamberts challenged the City's permit denial as a regulatory taking of their property under *Nollan*. The trial court granted summary judgment to the City, upholding the constitutionality of the City's actions solely on the authority of a substantive due process decision. App. F-1. On the Lamberts' motion for reconsideration the trial court retained its ruling, this time citing to a recent decision of the California Supreme Court. App. E-1.

A divided panel of the California Court of Appeal affirmed. The two-justice majority found that the heightened level of review mandated by this Court in *Nollan* applies only to *successful* exactions in exchange for development permits. App. A-10-11. Because the Lamberts refused to accede to the City's demand for a $600,000 exaction and their permit was therefore denied, the majority refused to examine whether there was an

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[30] *Id.* at 103.

[31] *Id.* at 104.

[32] *Id.* at 105.

[33] "[T]he record is clear that the City sought a mitigation fee from the Lamberts and denied the permit when they failed to offer a satisfactory amount." App. A-16 (Strankman, P.J., dissenting).

essential nexus between the City's demand for cash and the advancement of any legitimate regulatory interest. *Id.* In reaching this conclusion, the majority relied heavily on *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892 (1986), a pre-*Nollan* case that was decided under the deferential standard of review applicable to due process or equal protection challenges.

In dissent, Presiding Justice Strankman recognized that the heightened judicial review mandated by *Nollan* must be applied in cases such as this one if this Court's landmark decision is "to achieve [its] legal aim." App. A-20 (Strankman, P.J., dissenting). As the Presiding Justice explained:

> I do not believe the results in *Nollan*, *Dolan* and *Ehrlich* would have differed had the regulatory agencies demanded the exaction and then denied the permit when the demand was refused . . . . To believe otherwise is to believe a regulatory agency can evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of its exaction demands.

Id. at A-20-21. This insightful analysis by the Presiding Justice illustrates the need for this Court to resolve the issue of whether its *Nollan* doctrine can be evaded by cash-hungry regulatory agencies by the simple expedient of denying discretionary development permits when extortionary demands are not met.

Petitioners Claude and Micheline Lambert now respectfully ask this Court to issue a writ of certiorari and provide much-needed direction on this important question of federal constitutional law.

REASONS FOR GRANTING THE PETITION

In the decision below, the California Court of Appeal ruled that the heightened judicial scrutiny mandated by this Court in *Nollan v. California Coastal Commission* does not apply where

a development permit is *denied* when the property owner refuses to comply with an unconstitutional condition. If this decision is allowed to stand, it will open the door to wholesale evasions of *Nollan*. Instead of granting permits subject to exactions that are unrelated to the impact of the proposed use of the property in question, regulatory agencies need merely to demand compliance with the unconstitutional exaction *in advance* and deny the permit outright if the landowner fails to comply. As was noted by the dissenting justice below, such "shrewd repositioning" of exaction demands cannot be allowed to defeat the protection of close judicial review of exaction demands under *Nollan*.

This is the latest in a series of decisions in which the California courts have sought to diminish the scope of this Court's *Nollan* doctrine. *See, e.g., Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 166 (1992) (holding that *Nollan*, at that time this Court's leading regulatory takings decision, does not apply to regulatory takings); *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1073-75 (1995) (holding that the two-pronged, disjunctive regulatory takings standard set forth in *Nollan* is actually a *conjunctive* standard--a taking will be found only when a regulation ***both*** fails to substantially advance legitimate state interests ***and*** deprives the owner of economically viable use of his property). It is grimly ironic that the courts of California--the state whose extortionary land use practices prompted this Court to spell out the requirement of heightened judicial review in *Nollan*--have taken the lead in searching for ways to evade the thrust of that landmark decision.

The holding of the court below, that *Nollan's* "substantial advancement" analysis is not applicable when a development permit is denied, was squarely addressed and rejected by this Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999). In *City of Monterey*, as in the case at bar, a city's denial of a development permit was

challenged as a regulatory taking on the grounds that the city's actions leading up to the permit denial did not substantially advance legitimate state interests. In upholding the finding of takings liability against the City of Monterey on this standard, this Court necessarily rejected the contrary rule applied by the court below in this case. Moreover, since *City of Monterey* was a California case coming to this Court by way of the Ninth Circuit, there is now a conflict between the state and federal courts in California on this important question of federal constitutional law.

This Court should grant certiorari in order to resolve the conflict between the California Court of Appeal, this Court, and the Ninth Circuit on the scope of *Nollan's* heightened review of exactions demanded by local permitting agencies in exchange for the issuance of discretionary land use permits.

I

THE QUESTION PRESENTED IS IMPORTANT

A. This Case Will Determine the Continued Viability of *Nollan* in California

Nollan v. California Coastal Commission marks one of this Court's greatest achievements in the field of property rights in the past 20 years.[34] Prior to *Nollan*, constitutional protections of the rights of property owners in California were virtually nonexistent. State and local regulators routinely

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[34] *See, e.g.*, Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue* 137-38 (1999) ("*Nollan* was the first case in which the 'substantially advancing' prong of the *Agins* test was actually relied upon to find a regulatory taking"); Rigoberto V. Obregon and Rebekah L. Parker, *Comment: "Get It Right the First Time": A Message from the United States Supreme Court to Land Use and Environmental Regulators--A Comment on Nollan and First English*, 7 UCLA J. Envtl. L. & Pol'y 173, 174 (1988) (*Nollan* "will materially affect the manner in which state and local governments enact land use and environmental regulations").

conditioned the issuance of land use permits with arbitrary exactions of cash or realty, regardless of any impact the proposed use of property might have on the community. This practice was warmly endorsed by the California courts:

> As we pointed out in *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628, 209 Cal.Rptr. 628, the justification for required dedication is not limited to the needs of or burdens created by the project.

Nollan v. California Coastal Commission, 177 Cal. App. 3d 719, 723 (1986). The state judiciary refused to apply any meaningful review to permit conditions to ensure that local regulators were not simply extorting assets from property owners in exchange for permits. *Id.* at 722.

In contrast, this Court's *Nollan* decision established a workable balance in the context of permit conditions:

> [Under *Nollan*] government agencies may continue to use innovative land use regulations that balance the benefits of an exaction program with the burdens of covered construction. Zoning authorities may not, however, accumulate societal gains at the expense of innocent individuals under the facade of an exaction program.

John P. O'Connor, Jr., Note, *Extortion Loses a Synonym Thanks to Court Ordered Accountability in Land Use Exaction Programs*, 57 U. Cin. L. Rev. 397, 421 (1988).

Now, under the decision below, this balance will be shattered. The City has pointed the way for all California land use regulators to resume their pre-*Nollan* practice of "accumulating social gains" at the expense of permit applicants, through the simple expedient of demanding cash in advance for development permits.

If *Nollan* is to continue to achieve its purpose in the face of "shrewd repositioning" of exaction demands by cash-hungry regulatory agencies, this Court must make it clear that heightened scrutiny is not limited to cases involving the actual issuance of conditional permits. Instead, close review under *Nollan* must be triggered by evidence that an agency has sought to obtain an individualized, discretionary financial exaction in the course of processing an application for a development permit.

B. The Importance of This Case Is Underscored by Amicus Briefs Filed with the California Supreme Court by the State of California and Sixty California Cities

The singular importance of this case was reflected by the large number of briefs amicus curiae filed in support of both sides while this matter was pending before the California Supreme Court. Briefs were filed by the State of California, 60 California cities, the Western Center on Law and Poverty, the Council of Community Housing Organizations, the Southern California Association of Non-profit Housing, the Tenderloin Housing Clinic, the Golden Gate Hotel Association, San Francisco Hotel Association, and the San Francisco Apartment Association. The significance of the issues raised by this case is best illustrated by the governmental entities that submitted briefs *in support of the City*.

On March 25, 1999, the State of California filed a brief amicus curiae in support of the City with the California Supreme Court. In this brief, the Attorney General of the State of California stated:

> ***This case is of major consequence to California, its political subdivisions, and its residents because it raises a critical question concerning implementation of the doctrine of "regulatory takings," which is itself a matter of significant***

> ***interest in the development of constitutional and environmental law.***

Brief of the State of California in Support of Respondents at 1 (emphasis added). The Attorney General continued:

> ***The issue raised by this case is of great importance to California and to its 58 counties and approximately 500 cities. . . . The issue presented by this case is of major consequence to California as it oversees and implements this interrelated scheme of land use regulatory laws. A failure by this Court to sustain the decision below would greatly impair the ability of California and its political subdivisions to carry out their land use planning and permitting responsibilities.***

Id. at 4, 6 (emphasis added).

To an observer outside the State of California, it might seem incredible that the state and its cities would consider themselves seriously threatened if landowners could sue under the Fifth Amendment when development permits are denied for failure to make large cash payments to the appropriate regulatory agencies. Sadly, however, this is an accurate assessment of the state of land use regulation in California today. As the amicus brief filed by 60 California Cities put it,

> applying *Nollan/Dolan* to permit denials ***would have a devastating impact*** on the ability of local governments to regulate land uses within their boundaries.

Brief of 60 California Cities in Support of Defendants and Respondents at 7 (emphasis added). This suggests that California's cities may consider this case as significant as *Nollan* itself, since these governmental entities used virtually identical terminology to describe *Nollan's* importance in an amicus brief to this Court 12 years ago:

> A finding by this Court that dedication requirements are . . . subject to stricter scrutiny than other regulatory actions is legally insupportable and would have ***drastic implications***. . . . [It] would ***deprive state and local governments of one of their most essential planning tools***.

Nollan v. California Coastal Commission, Amicus Brief of 46 Cities, Six Counties, and the County Supervisors Association of California in Support of Respondent at 2 (emphasis added).

That California's cities believe their regulatory regimes would be *devastated* by close judicial review of extortionary practices such as those in the case at bar dramatically underscores the need for this Court to grant the petition for certiorari. If *Nollan's* protections are being routinely evaded by local governments "shrewdly repositioning" their exaction demands, intervention by this Court is imperative.

II

IF A $600,000 EXACTION WOULD TRIGGER HEIGHTENED SCRUTINY UNDER *NOLLAN* IF IMPOSED AS A CONDITION TO THE GRANTING OF A DEVELOPMENT PERMIT, THE CITY MUST NOT BE ALLOWED TO EVADE JUDICIAL REVIEW BY DEMANDING THE $600,000 IN ADVANCE, AND THEN DENYING THE LAMBERTS' PERMIT WHEN THE CASH IS NOT FORTHCOMING

The court below held that *Nollan's* "substantial advancement" standard does not apply when development permits are *denied*, since "neither a property right nor money was in fact taken from Lambert." App. A-12. Although *Nollan* would surely have come into play if the City had demanded its $600,000 as a condition *subsequent* to the issuance of the Lamberts' permit, the Court below found the *Nollan* analysis to have no applicability when the same $600,000 was demanded as a condition *precedent*. *Id.*

This holding is not simply erroneous; it threatens to strip this Court's "substantial advancement" standard of any utility in deterring predatory regulators from demanding exactions unrelated to the impact of proposed uses of property. If the City's $600,000 exaction would have been struck down as unconstitutional if demanded as a condition to the issuance of the Lamberts' permit, the denial of the permit following the Lamberts' refusal to pay the $600,000 must be seen as equally illicit.

A. The Exaction of a $600,000 Buyout to Allow a Hotel to Rent Out Its Vacant Rooms Would Not Withstand Constitutional Scrutiny Under *Nollan*

If the City had actually granted the Lamberts' conditional use permit subject to payment of the $600,000 HCO buyout, the fee could have been successfully challenged under *Nollan*. The exaction would have triggered "heightened" or "intermediate" scrutiny, a level of constitutional review the $600,000 exaction could not possibly withstand.

1. Close Judicial Scrutiny of the City's $600,000 Exaction Would Be Required Under *Nollan*

In *Nollan v. California Coastal Commission*, this Court established that regulatory takings challenges to the imposition of development exactions must be accorded heightened judicial scrutiny:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, . . . [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

483 U.S. at 834 n.3 (citations omitted).

Nollan established the basic requirement for constitutional review of exactions that are demanded as a condition to the issuance of discretionary land use permits. That requirement is that there must be an essential nexus between the demanded exaction and the alleviation of some public harm that would be generated by the owner's proposed use of his property. 483 U.S. at 836-37.

The City's proposed $600,000 exaction is precisely the sort of measure that would be struck down under *Nollan*, if it were straightforwardly imposed as a condition to the issuance of the Lamberts' permit.[35] The City exercised broad discretion both in determining that the Cornell Hotel was subject to the HCO (and to its tag-on requirement of a conditional use permit), and then in establishing how much the Lamberts would have to pay to buy their way out of this classification. Although one of the City's appraisals supported a mitigation fee of $488,584,[36] the City determined that the "most appropriate" fee would be $600,000.[37] When the Lamberts countered with an offer of $100,000 for the permit,[38] the City found the counteroffer

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[35] Indeed, ten years ago the New York Court of Appeals struck down a measure substantially identical to the HCO, finding that requiring hotel owners to rent their rooms to "residential" tenants or pay a buyout fee could not survive the "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" required by *Nollan*. *Seawall Associates v. City of New York*, 542 N.E.2d at 1068.

[36] App. A-14.

[37] *Id.*

[38] AA at 100.

insufficient[39] but invited further bargaining by the Lamberts.[40] It is hard to imagine a closer approximation to the regulatory bargaining envisioned by Justice Scalia as the antithesis of the *Nollan* doctrine:

> One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes . . . .

Nollan, 483 U.S. at 837 n.5.

2. There Is No Nexus Between the Prevention of the Lamberts' Use of Vacant Hotel Rooms for Tourist Rentals and the Stated Goals of the Hotel Conversion Ordinance

If the City's $600,000 exaction were subjected to heightened scrutiny it would obviously fail to pass *Nollan's* nexus requirement. The stated purpose of the City's Hotel Conversion Ordinance is

> [t]o benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.[41]

The record below shows that allowing the Lamberts to rent out their vacant rooms would have had no adverse impacts whatsoever on the City's low-income housing supply, nor would it have contributed to the displacement of any low-income, elderly, or disabled persons. The sole effect of the $600,000

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[39] *Id.* at 102.

[40] *Id.* at 344-45.

[41] HCO § 41.2, App. G -1-2.

exaction would have been to swell the City's revenues, not to mitigate any adverse impact of the Lamberts' proposed use of their property.

The City's own Annual Unit Usage Report found that there was a glut of vacant "residential" hotel rooms in San Francisco at the time of the Lamberts' application. A survey conducted by the Bureau of Building Inspection on July 5, 1994, established that there were 5,066 vacant rooms classified as "residential" in the 528 small hotels subject to the HCO.[42] This was a vacancy rate of nearly 30%.[43] The record further shows that there are no "long-term" residents at the Cornell Hotel who could be displaced by the "conversion" of the hotel's vacant rooms to tourist use.[44] Thus, allowing the Lamberts to rent out their empty rooms to tourists could not possibly have contributed to the problems the HCO was ostensibly designed to remedy, and the $600,000 exaction could not have "mitigated" these nonexistent harms.

No relationship has been shown between renting rooms in the Cornell Hotel and the problem of homelessness, nor are the Lamberts' so-called "residential" rooms earmarked for use by the homeless. The only nexus that appears from the record is between the City's desire for cash and its power to prevent the Lamberts from making lawful and productive use of their property. This falls far short of meeting the requirements set down by this Court in *Nollan*.

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[42] AA at 486-95.

[43] *Id.* This was not a statistical aberration. The City recognized that hotels such as the Cornell had vacancy rates of 26.82% in 1992 and 26.79% in 1993. *Id.* at 101.

[44] *Id.* at 253.

B. If Heightened Scrutiny Is Required When a City Grants a Discretionary Permit Conditioned on Payment of a $600,000 Exaction, It Must Also Be Required When the Permit Is Denied Following an Unsuccessful Attempt to Exact the Same $600,000 in Advance

The resolution of this case would be easy if the City had formally conditioned the issuance of the Lamberts' permit upon payment of the $600,000 mitigation fee. Under *Nollan*, the courts would have applied heightened scrutiny, the exaction would have been invalidated, and the Lamberts would have received their permit without having to pay the exaction.

The City sought to avoid this outcome by shrewdly withholding the permit until the $600,000 was in hand.[45] When the Lamberts balked at paying the unconstitutional exaction, the City simply denied their permit outright. Although nothing has changed except the timing of the City's illicit demand for cash, this approach successfully evaded close review by either the trial court or the court of appeal. Yet the policy considerations that mandated heightened scrutiny in *Nollan* are equally present in this situation. If close scrutiny would be warranted if the Lamberts' permit had been issued subject to a $600,000 exaction, the same heightened standard of review should be triggered by the City's denial of the permit for failure to pay the fee.

C. Permitting Agencies Must Not Be Allowed to Evade This Court's *Nollan* Doctrine by a "Shrewd Repositioning" of Their Exaction Demands

The point of *Nollan's* heightened scrutiny requirement is to protect individuals who need discretionary permit approvals

[45] The City's next step would have been to require the Lamberts to waive their right to make the payment under protest, thereby insulating the illicit exaction from any judicial review. This aspect of the City's permits-for-cash scheme was documented in the amicus brief of the Golden Gate Hotel Association and San Francisco Hotel Association to the California Supreme Court.

from improper leveraging of the police power by cash-hungry regulators.[46] In *Nollan*, the California Coastal Commission's demand for land in exchange for a building permit was described as an "out-and-out plan of extortion,"[47] which could only be thwarted if reviewing courts were willing to closely review the regulators' actions.

The threat of regulatory extortion does not depend on whether the agency grants a permit with a condition or denies the permit when the condition is not met. As Presiding Justice Strankman observed in his dissent below, there is no reason to believe the outcome in *Nollan* would have differed "had the regulatory agencies demanded the exaction and then denied the permit when the demand was refused." App. A-20-21 (Strankman, P.J., dissenting).

As the dissent below makes clear, the facts of this case *should* trigger heightened judicial scrutiny as a logical extension of this Court's holding in *Nollan*. Every indicator of improper leveraging by land use regulators is present in this case. When the Lamberts failed to submit to a $600,000 exaction the City denied their permit application without even attempting to demonstrate that renting out vacant rooms in the Cornell Hotel would displace residents or deny housing to any group protected by the Hotel Conversion Ordinance. The majority below found it "***somewhat disturbing***" that the City offered to waive its supposed police power concerns for a large cash payment, but nevertheless deferred completely to the City's ruse. App. A-11.

There is no logical basis for the ruling of the majority below that *Nollan* has no applicability when a development permit is denied, rather than issued subject to an exaction. A respected legal treatise on zoning and planning law questions whether "the result in *Nollan* would have been different" if the

[46] *See Nollan*, 483 U.S. at 837, 837 n.5.

[47] *Id.* at 837.

Coastal Commission had denied the Nollans' permit application outright for failure to hand over the property interest the Commission demanded.[48] As the dissent below explains, failing to recognize this equivalence presents a blank check to regulatory agencies, allowing them to

> evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of [their] exaction demands.

App. A-21 (Strankman, P.J., dissenting).

This cannot be what this Court intended in *Nollan*. Complying with the Takings Clause must require "more than an exercise in cleverness and imagination"[49] if *Nollan* is to offer the protection to property owners this Court intended.

D. It Is Immaterial That the City Did Not Acquire Something Tangible from the Lamberts Because the Constitution Protects Rights, Not Things

The key to the erroneous holding below may lie in a fundamental misconception by the *Lambert* majority that the Constitution protects *tangible things* instead of *rights*. If $600,000 had actually changed hands in exchange for the Lamberts' permit, the majority below would presumably have found a taking. If an easement or other interest in real property had been seized in exchange for the conditional use permit, the majority below would presumably have not hesitated to apply *Nollan*. But since neither land nor money was actually acquired by the City, the majority mistakenly concluded the protections of the Takings Clause were not implicated. App. A-12.

It has been well accepted for most of this century that protected property interests under the Constitution consist not

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[48] 1 Rathkopf, *The Law of Zoning and Planning* § 6.10(d) at 6-110 (4th ed. 1997).

[49] *Nollan*, 483 U.S. at 841.

of tangible objects but of "bundles" of rights.[50] Chief among the protected interests comprising property are the rights of possession, disposition, and use.[51] As to the third of these incidents of ownership, this Court has noted that "[w]e have little difficulty accepting the theory that *the use of valuable property . . . is itself a legally protectable property interest.*"[52] The Constitution is unswerving in its protection of the rights of individuals to use private property, subject only to *legitimate* police power restrictions:

> *[W]henever* the state takes *any* user right out of Jones' bundle and puts it in *any* other bundle, private property should be understood to have been taken.[53]

When overreaching regulation interferes with what would otherwise be a lawful and productive use of private property, the protections of the Takings Clause are triggered. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1994), the State of South Carolina acquired nothing tangible from David Lucas, but the state's wrongful interference with Mr. Lucas' right to build a home on his property was found to violate the Takings Clause. By the same token nothing tangible was actually acquired by the Coastal Commission in *Nollan*; the

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[50] *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

[51] *See, e.g., Blacks Law Dictionary* (abridged 5th ed. 1983), entry for "property."

[52] *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 336 (1984) (emphasis added).

[53] Bruce A. Ackerman, *Private Property and the Constitution* 28 (1977) (emphasis in original). *Accord* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 57 (1985) ("Let the government remove any of the incidents of ownership, let it diminish the rights of the owner in any fashion, then it has prima facie brought itself within the scope of the eminent domain clause.").

Nollans were simply put on notice that they would be required to submit to certain demands *if they wished to avail themselves of their right to build a home on their property.*

> In both *Nollan* and *Lucas*, the [Supreme Court] made it clear that heightened judicial scrutiny will be applied when property rights are being significantly diminished by regulation or exaction.[54]

In short, the violation of the Takings Clause alleged by the Lamberts does not hinge on whether the City actually acquired their property or money, but on whether the City improperly interfered with the Lamberts' right to make productive use of their property for its intended purpose as a hotel. This is not a question that can be disposed of by deferring completely to the City's own account of the matter.

The City has made no serious effort to establish a legitimate police power rationale for forcing the Lamberts to maintain vacant rooms in their hotel. To the contrary, the undisputed facts advanced by the Lamberts in the trial court demonstrate that the City's predominant, if not its sole, concern was simply to increase its revenues to the tune of $600,000.

This is not a legitimate police power rationale. The facts adduced by the Lamberts should have triggered heightened judicial scrutiny of the City's actions under *Nollan*, regardless of the fact that the City did not actually acquire any tangible assets from the Lamberts.

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[54] William C. Leigh and Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 BYU L. Rev. 827, 840 n.65.

III

THIS COURT, IN *CITY OF MONTEREY v. DEL MONTE DUNES*, RECENTLY AFFIRMED THAT *NOLLAN'S* "SUBSTANTIAL ADVANCEMENT" STANDARD IS APPROPRIATE IN EVALUATING WHETHER THE DENIAL OF A DEVELOPMENT PERMIT VIOLATES THE TAKINGS CLAUSE

The central holding of the court below is that *Nollan's* heightened standard of review does not apply when a development permit is denied for failure to comply with an unconstitutional precondition:

> [A]s neither a property right nor money was in fact taken from Lambert . . . there is nothing requiring review under the *Nollan/Dolan/Ehrlich* standard.

App. A-12. This holding was squarely rejected by this Court some 20 months later in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624.

City of Monterey, like the case at bar, involved a regulatory taking claim based on the wrongful denial of a discretionary development permit. *Id.* at 1631. The jury was instructed to find that Monterey's denial of the permit in question violated the Takings Clause if it found that "'the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose.'" *Id.* at 1634 (citation omitted). The trial court plainly invoked *Nollan's* heightened standard of review, instructing the jury to decide whether the permit denial satisfied the substantial advancement standard by a preponderance of the evidence. *Id.* The Ninth Circuit Court of Appeals agreed with the trial court that the constitutionality of Monterey's actions depended on "whether the city's denial of the final proposal substantially advanced legitimate public interests." *Id.*

This Court affirmed the finding of a compensable taking based on the denial of Del Monte Dunes' development permit. *Id.* at 1631. Although the majority opinion did not endorse the applicability of *Dolan's* "rough proportionality" test in this context, *id.* at 1635, the Court plainly affirmed the applicability of the *Nollan* analysis to permit denials:

> [A]lthough this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions . . . ***we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability.***

Id. at 1636 (emphasis added).

Thus the core holding of the court below, that *Nollan's* "substantial advancement" analysis is inapplicable to permit denials, was flatly contradicted by this Court's opinion in *City of Monterey*. The interests of justice required the California Supreme Court to reverse the decision below in light of *City of Monterey*, but the state's highest court chose instead to dismiss its own order granting review. App. B-1. The California Supreme Court's action leaves the Lamberts suffering a manifest injustice which this Court should resolve by granting the writ of certiorari or alternatively by summarily reversing the court of appeal and remanding for reconsideration in light of this Court's opinion in *City of Monterey*.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be GRANTED.

DATED: October, 1999.

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Filed 9/23/97

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

CLAUDE LAMBERT, et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation, et al., Defendants and Respondents.	A076116 (San Francisco County Super. Ct. No.963368)

Claude and Micheline Lambert (hereafter, "Lambert") are the owners of the 58-unit Cornell Hotel in San Francisco. Lambert filed the present action to challenge the decision of San Francisco's Planning Commission disapproving his application to convert 24 of the hotel's units from long-term residential use to tourist use. The trial court rejected the challenge, granting summary judgment to San Francisco. We will affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1979, San Francisco's Board of Supervisors took action in response to concerns that the city had a serious housing shortage for low income and elderly residents caused by the conversion of residential hotels into tourist hotels or condominiums. These concerns, originally addressed by a moratorium on the demolition or conversion of residential hotel units, resulted in the adoption of 1981 legislation limiting the ability of

hotel owners, such as Lambert, to convert existing residential units to tourist units. Lambert's proposed conversion is affected by two interrelated bodies of local law: San Francisco's Planning Code, and San Francisco's Hotel Conversion Ordinance (the "HCO"). The Cornell hotel is located in a district zoned for high density residential-commercial use. The Planning Code provides that tourist hotels in that zone are permitted only upon the granting of conditional use authorization by the Planning Commission. (§ 209.2(e).) To the extent a hotel has been operated as a tourist hotel in the past, that use is considered a permitted conditional use, but it may not be "significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." (§ 178(a)(2), and (c).) The HCO, as relevant, prohibits hotel owners from converting residential hotel units to tourist units without first obtaining a permit from the Planning Commission. (HCO § 41.6) The HCO further provides that before a permit may be issued, the owners must provide for one-to-one replacement of the units either by adding replacement units to San Francisco's residential housing stock, or by paying an amount equal to the costs of rebuilding an equal number of legal, comparable units. (HCO § 41.7) Thus, an owner such as Lambert who desires to convert existing residential hotel units to tourist units must obtain both a conditional use permit under the Planning Code and permission under the HCO to convert the units, permission that may be given only if the owner replaces the units or agrees to pay the costs of constructing like units.

In October 1981, in compliance with the HCO, Lambert reported that the Cornell Hotel had 31 residential units and 27 tourist units. In 1990, Lambert applied to the Planning Commission for a conditional use permit to convert all of the hotel's residential units to tourist. The Planning Commission ultimately denied Lambert's request for a conditional use permit, finding that the proposed use was neither desirable nor necessary, would be injurious to personal and property interests in the

neighborhood and the community and would be inconsistent with the policies and objectives of San Francisco's Master Plan. Lambert then petitioned the superior court for a writ of administrative mandate, challenging the decision to deny his application for a conditional use permit.

In the meantime, in 1993, and notwithstanding that Lambert himself had reported that the Cornell Hotel had both residential and tourist units, Lambert applied to the Zoning Administrator for a formal determination of the use classification of the hotel and whether it might be converted to full tourist use without a conditional use permit. The Zoning Administrator determined, in accordance with Lambert's earlier representations, that 31 of the hotel's units were residential and 27 units were tourist. The Administrator further determined that Lambert could convert the hotel to a tourist hotel only upon receiving conditional use authorization. Lambert appealed that determination. The Board of Permit Appeals, partially overruling the Zoning Administrator, found that seven of the units classified as residential properly should be classified as tourist because they were legal non-conforming commercial units.[1] As a result, Lambert was entitled to reclassify seven units from residential to tourist. The practical result of the Board's ruling was that Lambert was entitled to use the seven units for tourist purposes without obtaining a conditional use permit. The remaining 24 rooms originally classified for residential use, however, were still classified for residential use under the Planning Code. It followed that they could be converted to tourist use only upon obtaining a conditional use permit.

To complicate things further, the seven reclassified units continued to be classified as residential units for purposes of the HCO. The Planning Commission accordingly ruled that

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[1] The reclassification resulted from that fact that the HCO permitted summer tourist use of no more than 25 percent of the total residential units in a hotel such as the Cornell Hotel.

Lambert could not convert them to tourist use without complying with the HCO's one-for-one provisions. Lambert filed a second action in the superior court. Where the first action challenged the decision to deny Lambert conditional use authorization as to the units still classified residential, the second action challenged the decision to require him to comply with the one-for-one provisions of the HCO as to the seven units newly classified for tourist use. The superior court consolidated the two actions. It later granted the petition for writ of mandate as to the second action, severed the cases and remanded to the Board of Permit Appeals the issue of whether a permit to convert the seven units to tourist units should be conditioned on Lambert's compliance with the one-for-one provisions of the HCO. The Board of Permit Appeals resolved the matter by finding that the units could be converted without compliance with the one-for-one provisions.

The present case therefore does not concern the decision to require Lambert to comply with the one-for-one provisions under the HCO, which decision reached only the seven newly classified units and in all events was reversed by the Board of Permit Appeals. Rather, the present case concerns the Planning Commission's decision to deny Lambert's application for a conditional use permit to convert the remaining 24 residential units to tourist use. Lambert's theory in the trial court was that the denial of the permit constituted an unlawful taking. The superior court found that the denial of the permit was not a taking, and granted summary judgment on that basis.

DISCUSSION

I

Neither San Francisco's Regulations Nor the Refusal to Grant the Conditional Use Permit Effected a "Taking"

Lambert does not directly challenge the validity of the local regulations themselves, and thus does not challenge the right of the Planning Commission to require him to obtain a conditional

use permit to convert his residential units to tourist use.[2] Nonetheless, it is appropriate to point out that in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal. App.3d 892, we upheld the HCO against claims that it violated principles of due process and equal protection, finding that "when tested according to traditional due process and equal protection standards, there can be little dispute that the ordinance serves a legitimate governmental interest, and does so by means reasonably and directly related to its goals." (*Id.* at p. 910.) We also rejected the argument that by restricting the use of residential hotel property the HCO effected a taking in violation of Amendment V of the United States Constitution and article I, section 19 of the California Constitution. (*Id.* at pp. 911-912.)

We see no reason to revisit our earlier decision here in any detail. As a general rule, no taking results from the down-zoning of property in such a manner as to limit its potential for development. "'A purchaser of land merely acquires a right to continue a use instituted before the enactment of a more restrictive zoning. Public entities are not bound to reimburse individuals for losses due to changes in zoning, for within the limits of the police power "some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community." (*Metro Realty v. County of El Dorado* [1963] 222 Cal.App.2d 508 . . . .)' [Citation.]" (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516, citing *Morse v. County of San Luis Obispo* (1967) 247 Cal. App.2d 600, 602-603.) In such cases, a taking occurs only if the application of the general zoning law to the particular

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[2] *152 Valparaiso Associates v. City of Cotati* (July 22, 1997, A075553) ___ Cal.App.4th ___ is not applicable here because the plaintiff there were challenging the regulations — rent control laws — limiting their use of their property. Lambert is not challenging the regulation at issue, but the administrative decision to deny him a conditional use permit.

property does not substantially advance legitimate state interests or denies an owner economically viable use of his land. (*Agins v. City of Tiburon* (1980) 447 U.S. 255, 260.) That application of a general zoning law reduces the value of land is not a denial of economically viable use of the land. "[U]nlike a regulation which effects a taking by prohibiting all economically beneficial uses of the land in question (see *Lucas, supra*, [*Lucas v. So. Carolina Coastal Council* (1992) 505 U.S. __ [120 L.Ed.2d 798, 112 S.Ct. 2886], [120 L.Ed.2d at pp. 814-815]), the promulgation of a zoning law which results in only a diminution in the value of the affected property is not a taking. (*Euclid v. Ambler Co.* (1926) 272 U.S. 365, 396-397 [71 L.Ed. 303, 314-315, 47 S.Ct. 114, 54 A.L.R. 1016]; *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 514-515, 518 [125 Cal.Rptr. 365, 542 P.2d 237.]) [¶] The denial of the highest and best use does not constitute an unconstitutional taking of property. (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036 [282 Cal.Rptr. 877], cert. den. (1992) __ U.S. __ [120 L.Ed.2d 898, 112 S.Ct. 3027].) Even when there is a very substantial diminution in the value of land, there is no taking. ([*MacLeod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541], 547-548, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 [60 L.Ed. 348, 36 S.Ct. 143]--diminution in value from $800,000 to $60,000 not a taking; *William C. Haas v. City & Cty. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120--diminution in value from $2 million to $100,000 not a taking.)' (*Long Beach Equities, Inc.* supra, 231 Cal.App.3d at p. 1036.)" (*Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal.App.4th 10, 22-23.) In the present case, as we noted in *Terminal Plaza*, the enactment of the HCO and the amendment of the Planning Code limiting the ability of landowners to convert residential hotel units to tourist units, substantially furthered legitimate interests in ensuring the existence of affordable residential housing, did so by a means reasonably and directly related to its goals, and did not deprive hotel owners, such as Lambert, of the

economically viable use of their property. (See *Terminal Plaza Corp. v. City and County of San Francisco, supra*, 177 Cal.App.3d at pp. 910-912.) It follows that the restriction on development resulting from these laws, in and of itself, is not a "taking."

Lambert's argument, reduced to its essentials, is that a taking occurred when the Planning Commission refused to grant a conditional use permit to except the Cornell Hotel from the limitations imposed on his hotel, and all others, by the local regulations. In analyzing this contention, we begin by noting that in applying for the conditional use permit Lambert was seeking to alter an existing use. He therefore was applying for a property right he did not have. San Francisco's refusal to issue the permit thus deprived him of nothing. Comments made by the court in *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal. App.3d 234, 244 are apposite: "The regulations at issue in this case are only operating to restrict new uses of the subject Property, not to eliminate existing ones. There is no constitutional right on the part of landowners to develop their property for maximum economic profit, or to receive compensation when land use regulations restrict their ability to do so. As stated by the United States Supreme Court: "[T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. [Citations.]"

Lambert, however, argues there is a triable issue of fact as to whether a taking occurred because the record contains evidence that San Francisco would have granted the conditional use permit had he agreed to pay $600,000. The issue here, however, is not whether a taking occurred, because San Francisco took neither $600,000 nor a permitted use from Lambert. It simply denied him a conditional permit to exploit a property interest. The question is whether San Francisco denied

the permit for improper reasons. The Planning Commission found that the proposed conversion would not provide a development that is necessary or desirable for, and compatible with, the neighborhood and community. In support of that finding, the Planning Commission noted that the hotel was located in a neighborhood of mixed residential and commercial use, and that the current mix of uses at the Cornell Hotel was compatible with the neighborhood. It noted that Lambert had failed to demonstrate that there was insufficient demand for such group (i.e., residential) housing as exists at the Cornell Hotel. It noted that the classification of the area as mixed residential/commercial preserved important housing resources near the downtown area. The Planning Commission also found that the proposed conversion would be injurious to property, improvements or potential development. In support of this finding, the Planning Commission noted that long-term tenancy in group housing would provide for a more stable resident population. The proposed conversion could be expected to increase the number of tour bus, taxicab and other forms of chartered transportation with an attendant increase in parking and traffic congestion. Finally, the Planning Commission found that San Francisco's housing stock must be preserved and that the proposed conversion would not promote several policies and objectives of San Francisco's Master Plan. These are (1) to retain the existing supply of housing, (2) to maintain and improve the physical condition of housing while maintaining existing affordability levels and (3) to provide a quality living environment.

Where, as here, no taking occurred, our task is to determine whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515; *Harris v. City of Costa Mesa* (1994) 25 Cal. App.4th 963, 969; *PMI Mortgage Ins. Co. v. City of Pacific Grove* (1981) 128 Cal.App.3d 724,

729.) The evidence here fully supports both the findings and the decision. It is not, nor can it be, contested that San Francisco has a legitimate interest in preserving affordable residential housing stock, ensuring adequate residential housing in the downtown area, preventing an increase in traffic congestion and parking and in providing a quality living environment. There is no question but that requiring a conditional permit before existing housing stock can be converted to commercial use substantially furthers that legitimate interest. There is no question but that denying a permit to convert residential housing to tourist use also furthers that legitimate interest. Indeed, Lambert does not appear to claim otherwise. He argues that the action of denying *him* a conditional use permit did not further this interest, citing evidence that there were only two long-term residents living in the Cornell Hotel, that he had offered these residents life-time leases and that there are a large number of vacant residential units in San Francisco. That few of the Cornell's rooms currently are occupied by long-term residents, however, does not mean that there are no persons interested in establishing a long-term residency there. The Planning Commission found that Lambert had "failed to demonstrate there is insufficient demand for such group housing as exist[s] at the Cornell Hotel. Marketing of potentially desirable group housing, possibly including the provision of certain meals (as currently offered to residents and guests) may result in full occupancy to meet the operational needs of [Lambert]." Lambert's evidence further does nothing to dispute the findings that the continued use of the property would serve to preserve the character of the neighborhood, would preserve the availability of affordable housing, and would prevent additional traffic congestion and parking.

In conclusion, the HCO and the amendments to San Francisco's Planning Code meet constitutional requirements and did not and do not effectuate a taking on affected hotel owners such as Lambert. The decision to deny Lambert a conditional

use permit also did not effect a taking. Finally, substantial evidence supports the Planning Commission's findings that denial with further legitimate governmental interests.

II

The Standard of Review Stated in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374 and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 Has No Application Here

Lambert contends that the trial court erred in failing to apply the strict scrutiny standard of review stated in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374 and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854. These cases, however, define the standard of review to be applied in circumstances that do not exist here: that occurring when an issuing agency demands some sort of exaction as a condition of issuing a conditional use permit.

In *Nollan v. California Coastal Comm'n, supra*, 483 U.S. 831, the local authority conditioned a permit to rebuild a beach front residence on establishing a public easement across the property. The Supreme Court found that the condition would be an unconstitutional taking unless it bore a sufficient nexus to the purpose being advanced by requiring the condition. (*Id.* at pp. 836-837.) In *Dolan v. City of Tigard* (1994) 512 U.S. 374, the court held that requiring an owner to dedicate to the public a portion of her land as a condition of a proposed development would be a taking unless it not only bore a sufficient nexus to the purpose being advanced by requiring the condition, but demanded a degree of exaction roughly proportional to the impact of the proposed development. (*Id.* at pp. 391, 395-396.) As this state's high court summarized: "Where the local permit authority seeks to justify a given exaction as an alternative to denying a proposed use, *Nollan* requires a reviewing court to scrutinize the instrumental efficacy

of the permit condition in order to determine whether it logically furthers the same regulatory goal as would outright denial of a development permit. A court must also, under the standard formulated in *Dolan*, determine whether the factual findings made by the permitting body support the condition as one that is more or less proportional, in both nature and scope, to the public impact of the proposed development." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 868.) The court further held that the same standard of review applies whether the authority conditions permit approval on the exaction of an interest in land or on the exaction of fee charged in lieu of the dedication of land. (Id. at p. 876.)

These cases do not alter the standard for reviewing the validity of a land use ordinance such as the HCO and do not alter the standard for reviewing a decision to deny a conditional use permit. They do no more than recognize that an exaction from a party deprives that party of something, be it a property right or a sum of money. They then provide a test for determining when such an exaction is a taking, holding that it is a taking unless it both furthers the same goals as would an outright denial of the permit and is roughly proportionate to the public impact of the proposed development.

Although Lambert contended in the trial court, and contends here, that the issuance of the conditional use permit was conditioned on his compliance with the one-for-one provisions of the HCO, this contention misstates the facts. The Planning Commission's decision to deny Lambert a conditional use permit was made not under the HCO, but under the authority, of the Planning Code. Under that Authority, the Planning Commission denied him a conditional use permit altogether. We recognize that Lambert's position is that the record contains evidence that San Francisco would have issued a conditional use permit if he paid $600,000. While it is somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood might have been overcome by

payment of significant sum of money, the fact remains that San Francisco did not demand anything from Lambert as a condition of a use permit. It simply denied the permit outright. That the Planning Commission might have granted the permit upon payment of $600,000 does not make its refusal to issue the permit into a taking. Moreover, as Lambert concedes, in determining the validity of the administrative decision, we do not look into the subjective motivation of members of the Planning Commission. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 776-779.) In short, as neither a property right nor money was in fact taken from Lambert, there is no reason to determine a taking would have occurred had Lambert been required to pay $600,000 as a condition of a use permit, and thus there is nothing requiring review under the *Nollan/Dolan/Ehrlich* standard.

The judgment is affirmed.

Stein, J.

I concur:

Dossee

Strankman, P.J., Dissenting

I dissent. I believe the record establishes that the City and County of San Francisco (City) sought money from Claude and Micheline Lambert as a condition to receiving the requested zoning permit and denied the permit when the Lamberts failed to pay the City's price. The majority acknowledges evidence that the City "might" have granted the permit if the Lamberts had paid the City $600,000, but discerns a distinction between denying a permit after the applicants fail to meet a condition and granting a permit upon a condition. (Maj. opn., pp. 7,11.) I see no meaningful distinction.

The City Conditioned Approval of the Zoning Permit Upon Payment of a Mitigation Fee.

The Lamberts' 58-room Cornell Hotel is regulated by the City's Residential Hotel Unit Conversion and Demolition Ordinance (HCO) which designated the hotel rooms as 31 residential units and 27 tourist units, based on the units' occupancy status in 1979.[1] (S.F. Admin. Code, §§ 41.1, 41.2, 41.4, subds. (a), (q), (s).) A hotel owner cannot convert one of his residential units into a tourist unit without a permit to convert. (S.F. Admin. Code, § 41.12.) No permit will be granted unless the hotel owner provides "one-for-one replacement of the units to be converted," such as by building comparable replacement units or paying to the City an amount equal to site acquisition costs and a percentage of the cost of building comparable replacement units. (S.F. Admin. Code,

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[1] The classification currently stands at 24 residential units and 34 tourist units, due to an administrative recalculation. (See Maj. Opn., pp.3-4).

§ 41.13, subds. (a)(1), (a)(4).) At the time relevant here, the "in-lieu fee" was 40 percent of the replacement cost plus site acquisition costs; today the replacement cost percentage has doubled to 80 percent. (S.F. Admin. Code, § 41.13, subd. (a)(4).) In 1990, the Lamberts applied under the HCO for a permit to convert their designated 31 residential rooms to tourist use. The City informed them that a conditional use permit was required to allow the change in use. A conditional use permit was required because an increase beyond the HCO-designated tourist hotel rooms constituted an enlargement of the Cornell Hotel's permitted conditional use. (S.F. Planning Code, § 178, subd. (c).) The Lamberts promptly applied for a conditional use zoning permit.

Meanwhile, "[i]n accordance" with the HCO, the City's Real Estate Department obtained two appraisals of the Cornell Hotel residential units' replacement cost.[2] (S.F. Admin. Code, § 41.13, subd. (a)(4).) The particulars of those appraisals were transmitted between City departments in 1992. Both appraisals were calculated under the HCO-prescribed formula, but the "range of value" between the two appraisals was conceded by the Real Estate Department to be "considerable:" $488,584 on the one end, and $612,887 on the other end. (S.F. Admin. Code, § 41.13, subd. (a)(4).) The Real Estate Department concluded that "the most appropriate estimate of the 40% replacement cost of existing residential rooms at the Cornell Hotel and the value of the required land on which to construct them is $600,000."

In early 1994, the City conducted several public hearings on the Lamberts' zoning permit application. At that time, the HCO had been declared unconstitutional by a federal district court and its enforcement permanently enjoined. (*Golden Gate Hotel v. San Francisco City & County* (N.D. Cal. 1993) 836 F.Supp.

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[2] The City's Real Estate Department reviews HCO permits to convert unless the public requests review by the City's Planning Commission.

707.) The injunction was in place from the district court's September 9, 1993, ruling until March 18, 1994, when the Ninth Circuit reversed it and remanded the case for consideration of the City's claim that the facial challenge under the takings clause was time barred. (*Golden Gate Hotel Ass'n v. San Francisco* (9th Cir. 1994) 18 F.3d 1482.) The City ultimately prevailed on that claim. (*Golden Gate Hotel Ass'n v. City & County of San Francisco* (N.D. Cal. 1994) 1994 WL 443666, aff'd (9th Cir. 1996) 76 F.3d 386, cert. den. (1996) __ U.S. __ [117 S.Ct. 51].) But the HCO was not enforceable in January 1994, when the Planning Commission held its first hearing on the Lamberts' zoning permit application. Nevertheless, the HCO formula was among the mitigation measures considered by the City Planning Commission in reviewing the Lamberts' permit application. The report from the City Planning Commission's January 1992 hearing states: "A number of options exist for the Commission to determine the appropriate level of mitigation of the loss of rental housing stock. The Commission has discretion to impose no conditions on the requested Conditional Use authorization or any condition reasonably related to the impacts of granting of this authorization." The report listed the HCO appraisals "[a]mong the possible mitigation measures," but also stated that other measures could be formulated.

The Lamberts' zoning permit application was denied on March 17, 1994. The City Planning Commission's ruling is based upon 26 express findings. Among those findings, are the following: "12. In accordance with [a provision of the HCO], the Department of Real Estate has obtained two independent appraisals of the in-lieu fee to be paid to the City and County of San Francisco to convert the thirty-one rooms of group housing (residential hotel units) to tourist hotel units .... Based upon the two valuations, the Department of Real Estate has determined the amount to construct comparable replacement residential hotel units to be $600,000. [¶] . . . [¶] 14. The Applicants made an offer for $100,000 to be paid in three

installments to compensate for the loss of group housing rooms from the City's housing stock if all 31 rooms of group housing were approved for conversion to tourist hotel use. [¶] . . . [¶] 20. In previous actions by this Commission, conversion of group housing rooms (residential hotel rooms) to tourist hotel use was approved for two nearby properties. Conversion of 15 rooms of group housing at The Juliana Hotel . . . was approved by the Commission on March 8, 1990 . . . . The conversion was approved upon the payment of $150,000 ($10,000 per group housing room) to the Residential Hotel Preservation Fund. Conversion of 10 rooms of group housing to tourist hotel rooms at . . . The Monticello Inn . . . was also approved by the Commission on March 8, 1990. . . . Conversion was also approved upon the payment of $150,000 ($15,000 per group housing room) to the Residential Hotel Preservation Fund. [¶] 21. The Commission finds that the requested authorization is not comparable to those previously granted in that the two other properties were predominantly tourist hotels. . . . The Commission also found in those cases that the housing loss had been mitigated through payment of a fee. [¶] 22. *The Applicants have failed to demonstrate that the amount offered for the construction or rehabilitation of 31 rooms of group housing is sufficient to mitigate the loss of housing stock by replacing the group housing rooms proposed for conversion.*" (Emphasis added.)

I think the record is clear that the City sought a mitigation fee from the Lamberts and denied the permit when they failed to offer a satisfactory amount. The City conducted appraisals that estimated the replacement value of the residential hotel rooms at $600,000. The Lamberts offered $100,000. The City had granted other zoning permits to hotel owners who paid $150,000 ($10,000 and $15,000 per room), but the Lamberts' offer amounted to only about $3,226 per room. The Lamberts "failed to demonstrate that the amount offered . . . is sufficient . . . ." I believe the City Planning Commission's express findings,

not its members' "subjective motivation," prove that the City would have granted the Lamberts' permit request had they succeeded in demonstrating that the amount offered was sufficient. (Maj. opn., p. 11.) In short, the City conditioned approval of the zoning permit upon payment of a "sufficient" mitigation fee, and denied the permit when payment was not made.

I recognize that the City Planning Commission's findings also included, as the majority rightly observes, a conclusion that the proposed conversion "would not provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community . . . ." (Maj. opn., p. 7.) But that finding is rooted in the Planning Commission's determination that "[t]he City's housing stock must be preserved." Had the Lamberts paid a fee to mitigate the loss of housing stock, the permit would have been granted. The Planning Commission specifically noted that permits were granted to two other hotels when "housing loss had been mitigated through payment of a fee." If, as I believe, the City conditioned approval of the permit upon exaction of a discretionary mitigation fee, then an "essential nexus" must exist between the City's state interests and the exaction, and the exaction must be "roughly proportional" to the impact of the Lamberts' tourist use of their hotel. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 386, 391.) A regulatory agency's legitimate state interests and "laudable" land-use goals will not support unrelated permit exactions. (*id.* at p. 396.)

Discretionary Permit Exactions are Subject to Heightened Scrutiny.

It is beyond question that the City has broad powers to regulate land use. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 834-835.) But land-use regulations like the zoning law at issue here must "substantially advance legitimate state interests" and not deny a property owner

"economically viable use of his land," lest it constitute a taking. (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.) The City is not free to attach conditions to its approval of a zoning permit which do not substantially advance legitimate state interests. Discretionary permit conditions that exact money or real property from landowners present "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends . . . ." (*Ehrlich v. City of Culver City* (1996)12 Cal.4th 854, 869 (plur. opn. of Arabian, J.), cert. den. (1996) __U.S. __ [117 S.Ct. 299].)[3] To assure that a discretionary permit exaction is related to legitimate regulatory ends, the government entity must demonstrate an "essential nexus" between the state interest and the permit condition, and a relationship of "rough proportionality" between the exaction and the impact of the proposed land use. (*Dolan v. City of Tigard*, *supra*, 512 U.S. at p. 391; *Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. at p. 837; *Ehrlich v. City of Culver City, supra*, 12 Cal.4th at pp. 869-874.)

In *Nollan*, the United States Supreme Court invalidated a coastal development permit conditioned upon the landowners granting a public easement across their beachfront property. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at pp. 827- 842.) The high court accepted the proposition that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." (*Id.* at p. 836.) But a permit condition must serve the same purpose as a permit refusal. "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land

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[3] Justice Werdegar joined in the plurality opinion's constitutional analysis without reservation, making it the holding of the Supreme Court. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 912 (conc. and dis. opn. of Werdegar, J.).)

use but an 'out-and-out plan of extortion.'" (*Id.* at p. 837.) An "essential nexus" must exist between legitimate state interests and the exacted condition. (*Ibid.*) The court found no such nexus between the state interest in preserving roadside ocean views and an easement allowing the public to walk across the landowners' property. (*Id.* at pp. 836, 838-842.)

In a more recent case, the United States Supreme Court found a nexus between state interests in flood prevention and traffic alleviation and a city's development permit conditions requiring a landowner to dedicate some of her commercial property for storm drainage and a pedestrian/bicycle pathway. (*Dolan v. City of Tigard, supra*, 512 U.S. at pp. 387-388.) But a nexus alone is not sufficient; there must also be a "'rough proportionality'" between the exaction and the impact of the proposed development. (*Id.* at p. 391.) In *Dolan*, the city failed to demonstrate that the demanded public floodplain easement was required for flood control, or that the demanded pathway was likely to offset traffic congestion created by the landowner's property development. (*Id.* at pp. 392-395.)

Our Supreme Court recently held that the *Nollan-Dolan* heightened standard of scrutiny applies to possessory and monetary discretionary exactions alike, and invalidated a zoning permit for construction of condominiums conditioned upon the landowner's payment of $280,000 to mitigate the loss of city land previously used for recreational facilities. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at pp. 859-863, 881.) The exaction failed the "rough proportionality" test because the city made no "individualized findings to support the required 'fit' between the monetary exaction and the loss of a parcel zoned for commercial recreational use." (*Id.* at p. 883.)

Here, the City makes no real effort to satisfy the *Nollan-Dolan-Ehrlich* standard, and instead argues that the standard is inapplicable because the permit was denied, rather than granted with express conditions. We are thus presented with a critical

legal question: is heightened scrutiny triggered when a government entity denies a permit when a condition is not met, rather than granting the permit with a condition? The majority answer in the negative, confining *Nollan*, *Dolan* and *Ehrlich* to their facts. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 828 [permit granted with condition]; *Dolan v. City of Tigard, supra*, 512 U.S. at p. 379 [permit granted with conditions]; *Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 862 [permit granted with condition].) I answer in the affirmative, extending *Nollan*, *Dolan* and *Ehrlich* to achieve their legal aim.

The standard of heightened scrutiny safeguards property owners needing development approval from a regulatory agency's improper leveraging of the state's police power. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 837 & fn. 5.) Discretionary permit exactions pose "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends . . . ." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 869.) Our Supreme Court has explained that the "standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators [of leveraging] in land use 'bargains' between property owners and regulatory bodies -- those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context -- where the individual property owner-developer seeks to negotiate approval of a planned development -- that the combined Nollan and Dolan test quintessentially applies." (*Id.* at p. 868.) The threat of leveraging exists whether the regulatory agency grants a permit with a condition or denies a permit when a condition is not met. I do not believe the results in *Nollan*, *Dolan* and *Ehrlich* would have differed had the regulatory agencies demanded the exaction and then denied the permit

when the demand was refused. (See 1 Rathkopf, The Law of Zoning and Planning (4th ed. 1997) § 6.10, subd. (d), p. 6-110 [suggesting no change in *Nollan* result had the regulatory agency denied the permit but offered to approve the permit conditioned upon an exaction].) To believe otherwise is to believe a regulatory agency can evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of its exaction demands. We should be intolerant of such evasions. Compliance with the Fifth Amendment's Property Clause is "more than an exercise in cleverness and imagination." (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 841.)

I would reverse the judgment for the City.

Strankman, P.J

Trial Court: Superior Court City and County of San Francisco

Trial Judge: Honorable William Cahill

Attorneys for Appellants: JAMES S. BURLING
R. S. RADFORD
VICTOR J. WOLSKI
Pacific Legal Foundation

Attorneys for Respondents:
LOUISE H. RENNE, City Attorney
ANDREW W. SCHWARTZ,
Deputy City Attorney

Appendix B-1

Filed 7/28/99

First Appellate District, Division One No. A076116

S065446

IN THE SUPREME COURT OF CALIFORNIA

CLAUDE LAMBERT et al., Appellants

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Respondents

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, First Appellate District, Division One.

George

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Chief Justice
Mosk

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Associate Justice
Kennard

_____

Associate Justice
Baxter

_____

Associate Justice
Werdegar

_____

Associate Justice
Chin

_____

Associate Justice
Brown

_____

Associate Justice

Appendix C-1

Filed 1/14/98

First Appellate District, Division One No. A076116

S065446

IN THE SUPREME COURT OF CALIFORNIA

CLAUDE LAMBERT et al., Appellants

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Respondents

Appellants' petition for review GRANTED.

George

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Chief Justice
Mosk

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Associate Justice
Kennard

_____

Associate Justice
Baxter

_____

Associate Justice
Werdegar

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Associate Justice
Chin

_____

Associate Justice
Brown

_____

Associate Justice

Appendix D-1

Filed 9/11/96

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

CLAUDE LAMBERT, an individual and MICHELINE LAMBERT, an individual Plaintiffs and Petitioners, v. CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING, SAN FRANCISCO CITY ZONING ADMINISTRATOR, and BOARD OF PERMIT APPEALS, Defendants and Respondents.	No. 963368 JUDGMENT FOR CITY

Based on the Court's Amended Order Granting Defendant's Motion for Summary Judgment filed on June 10, 1996, and Order Granting Motion for Reconsideration filed August 12, 1996, and good cause appearing, IT IS ORDERED, that defendant City and County of San Francisco shall be awarded judgment against plaintiffs Claude and Micheline Lambert.

DATED: 9/9/96

//s//WILLIAM CAHILL
WILLIAM CAHILL

Judge of the Superior Court

APPROVED AS TO FORM:

//s // R.S. RADFORD
R. S. RADFORD

Attorney for Plaintiffs,
Claude Lambert, et at.

Appendix E-1

Filed 8/12/96

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

CLAUDE LAMBERT, et al.,	)	NO. 963368
	)	
Petitioners,	)	ORDER GRANTING
	)	MOTION FOR
vs.	)	RECONSIDERATION
	)	
CITY AND COUNTY OF SAN FRANCISCO, et al.,	)	
	)	
Respondents.	)	

This matter came before this court on July 12, 1996. The Honorable William Cahill presiding, ordered this matter submitted. After consideration of all papers and arguments, this court orders as follows:

Plaintiffs' motion for reconsideration is GRANTED. However, this court's June 10, 1996 ruling, granting defendants' motion for summary judgment, remains the same under *Erlich v. City of Culver City* (1996) 12 Cal. 4th 854, a case cited and discussed in the parties' briefs in support of, and in opposition to, said motion.

DATED: August 12, 1996

//s//WILLIAM CAHILL
WILLIAM CAHILL
Judge of the Superior Court

Appendix F-1

Filed 6/10/96

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

CLAUDE LAMBERT, et al., Petitioners, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Respondents.	NO. 963368 AMENDED ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before this court on May 17, 1995. The Honorable William Cahill, presiding, ordered this matter submitted. After full consideration of all papers and arguments, this court orders as follows:

IT IS HEREBY ORDERED that defendant City and County of San Francisco's motion for summary judgment is GRANTED. There remains no triable issue of fact that the Hotel Conversion Ordinance is not a "taking" and is constitutional under the California and United States Constitutions. *Loyola Marymount University v. Los Angeles Unified School District*, 96 C.D.O.S. 3831 (May 29, 1996). Additionally, because the Hotel Conversion Ordinance is constitutional, the Board of Permit Appeals can properly consider the Hotel Conversion Ordinance when determining whether to give the plaintiffs a conditional use permit.

This order is identical to the order issued on May 31, 1996 except that the case number has been corrected.

DATED: June 10, 1996

//s// WILLIAM CAHILL
Judge of the Superior Court

As amended in Board 3/26/90

FILE NO 113-89-2 ORDINANCE NO. 121-90

[Hotel Conversion Ordinance]

AMENDING THE SAN FRANCISCO ADMINISTRATIVE CODE BY REPEALING CHAPTER 41 THEREOF (RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION) AND ENACTING A NEW CHAPTER 41; AND AMENDING PART ii, CHAPTER 1 OF THE SAN FRANCISCO MUNICIPAL CODE (BUILDING CODE) BY AMENDING SECTION 333.2 THEREOF, TO AMEND THE HOTEL CONVERSION FEE SCHEDULE.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Chapter 41 of the San Francisco Administrative Code ("Residential Hotel Unit Conversion and Demolition") is hereby repealed.

Section 2. The San Francisco Administrative Code is hereby amended by adding a new Chapter 41 ("Residential Hotel Unit Conversion and Demolition") thereto, reading as follows:

Chapter 41

Sec. 41.1 Title.

This Chapter shall be known as the Residential Hotel Unit Conversion and Demolition Ordinance.

Sec. 41.2 Purpose.

It is the purpose of this ordinance to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. This is to be accomplished by establishing the status of residential hotel units, by regulating the demolition and

conversion of residential hotel units to other uses, and by appropriate administrative and judicial remedies.

. . . .

Sec. 41.12 Permit to Convert.

(a) Any owner or operator, or his/her authorized agency, of a residential hotel may apply for a permit to convert one or more residential units by submitting an application and the required fee to the Central Permit Bureau.

(b) The permit application shall contain the following information:

(1) The name and address of the building in which the conversions are proposed; and

(2) The names and addresses of all owners or operators of said building; and

(3) a description of the proposed conversion including the nature of the conversion, the total number of units in the building, their current uses; and

(4) the room numbers and locations of the units to be converted; and

(5) Preliminary drawings showing the existing floor plans and proposed floor plans; and

(6) A description of the improvements or changes proposed to be constructed or installed and the tentative schedule for start of construction; and

(7) The current rental rates for each residential unit to be converted; and

(8) The length of tenancy of the permanent residents affected by the proposed conversion; and

(9) A statement regarding how one-for-one replacement of the units to be converted will be accomplished, including the proposed location of replacement housing if replacement is to be provided off-site; and

(10) A declaration under penalty of perjury from the owner or operator stating that he/she has complied with the provisions of Section 41.14(b) below and his/her filing of a permit to convert. On the same date of the filing of the application, a notice that an application to convert has been filed shall be posted until a decision is made on the application to convert.

(c) Upon receipt of a completed application to convert or demolish, the Bureau of Building Inspection shall send the application to the Department of City Planning for review and shall mail notice of such application to interested community organizations and such other persons or organizations who have previously requested such notice in writing. The notice shall identify the hotel requesting the permit, the nature of the permit, the proposal to fulfil the replacement requirements of Section 41.13 herein, and the procedures for requesting a public hearing. Owner or operator shall post a notice informing permanent residents of such information.

(d) Any interested party may submit a written request within 15 days of the date notice is posted pursuant to subsection (c) above to the City Planning Commission to schedule and conduct a public hearing on the proposed conversion in order to solicit public opinion on whether to approve or deny a permit to convert or demolish residential units and to determine whether proposed replacement units are "comparable units" as defined in Section 41.4(b) herein.

Sec. 41.13 One-for-One Replacement

(a) Prior to the issuance of a permit to convert, the owner or operator shall provide one-for-one replacement of the units to be converted by one of the following methods:

(1) Construct or cause to be constructed a comparable unit to be made available at comparable rent to replace each of the units to be converted; or

(2) Cause to be brought back into the housing market a comparable unit from any building which was not subject to the provisions of this Chapter; or

(3) Construct or cause to be constructed or rehabilitated apartment units for elderly, disabled or low-income persons or households which may be provided at a ratio of less than one-to-one; or construct or cause to be constructed transitional housing which may include emergency housing. The construction of any replacement housing under this subsection shall be evaluated by the City Planning Commission in accordance with the provisions of Section 303 of the City Planning Code. A notice of said City Planning Commission hearing shall be posted by the owner or operator ten (10) calendar days before the hearing; or

(4) Pay to the City and County of San Francisco an amount equal to Eighty Percent (80%) of the cost of construction of an equal number of comparable units plus site acquisition cost. All such payments shall go into a San Francisco Residential Hotel Preservation Fund Account. The Department of Real Estate shall determine this amount based upon two independent appraisals; or

(5) Contribute to a public entity or non-profit organization, who will use the funds to construct comparable units, an amount at least equal to eighty percent (80%) of the cost of construction of an equal number of comparable units plus site acquisition cost. The Department of Real Estate shall determine this amount based upon two independent appraisals. In addition to compliance with all relevant City ordinances regulations, the public entity or non-profit orgization and the housing development proposal of such public entity or non-profit organization shall be subject to approval by the Mayor's Office of Housing.

(A) Such contribution shall be paid to the approved public entity or non-profit organization in installments from an escrow account supervised by the Mayor's Office of Housing, upon application by such public entity or non-profit organization to the Mayor's Office of Housing. For specified expenditures, including but not limited to site acquisition costs, architect's fees, and construction costs; such payment shall be approved by the Mayor's Office of Housing prior to release of funds.

(B) The permit to convert shall be issued by the City when owner or operator deposits the full amount of funds in an escrow account described in subsection 41.11(a)(5)(A) above, or provides other form of non-refundable security acceptable to the City Attorney and the Mayor's Office of Housing.

(C) In the event that the public entity or non-profit organization is unable to complete construction of the replacement housing, any unpaid amounts shall be released to the City. All such funds shall go into a San Francisco Residential Hotel Preservation Fund Account.

(b) Any displaced permanent resident relocated to replacement units provided under subdivision (a) above shall be deemed to have continued his occupancy in the converted unit for the purpose of administering Subsection (k) of Section 37.2, San Francisco Administrative Code (San Francisco Rent Stabilization and Arbitration Ordinance).

(c) Any replacement units shall continue to be subject to the provisions of this Chapter.

(d) In the event that a completed application for a permit to convert is filed by a hotel owner or operator no later than the effective date of this amended Chapter, and such hotel owner or operator elects to provide one-for-one replacement of the residential units pursuant to Section 41.13(a)(4) or Section 41.13(a)(5) herein, the hotel owner or operator shall be obligated to pay to the City and County of San Francisco an

amount equal to forty percent (40%) of the cost of construction of an equal number of comparable units plus site acquisition cost, provided that such hotel owner or operator shall pay such amount to the City or provide to the City security for such payment in a form satisfactory to the Mayor's Office of Housing and the City Attorney within ninety (90) days following the date that the Bureau of Building Inspection determines that the application for a permit to convert is complete, or, if necessary, ten (10) days following final action, including any appeals, by the Planning Commission or appellate body, or ten (10) days following the Department of Real Estate's determination of such amount, whichever occurs latest. In the event that a hotel owner or operator elects to provide one-for-one replacement pursuant to Section 41.13(a)(2) or (a)(5) herein and the Mayor's Office of Housing has not approved a proposal or organization thereunder prior to the effective date of this amended Chapter, the Bureau of Building Inspection shall not reject such application as incomplete for such lack of information. If a hotel owner or operator applies for a permit to convert using the one-for-one replacement option described in 41.13(a)(2) or (a)(5) and the Mayor's Office of Housing does not approve a housing development proposal or a non-profit organization, or such project fails to progress through no fault of the owner or operator, such applicant shall be permitted to provide one-for-one replacement pursuant to Section 41.13(a)(4) at forty percent (40%) of the cost of construction of an equal number of comparable units plus site acquisition costs, provided that such applicant files the application under Section 41.13(a)(2) or (a)(5) no later than the effective date of this amended Chapter. The hotel owner or operator shall identify such housing proposal or non-profit organization within 180 days of the effective date of this amended Chapter. In the event that the Mayor's Office of Housing finds that the permit applicant has acted in good faith in seeking a project, the Mayor's Office of Housing may exercise its reasonable discretion to extend the provisions of this subsection for an

additional 180 days. In the event that a project approved by the Mayor's Office of Housing fails to move forward through no fault of the permit applicant, the applicant may substitute another project within six months of being notified by the Mayor's Office of Housing of a failure of the prior project to move forward. The Mayor's Office of Housing may extend this period for an additional 180 days to identify such new proposal. The City shall issue a permit to convert under this subsection 41.13(d) only if the hotel owner or operator has either paid the 40% in lieu fee to the City pursuant to Section 41.13(a)(4) herein or complied with the requirements of Sections 41.13(a)(2) or (a)(5) as applicable. In the event that a hotel owner or operator has not complied with any of these requirements and the City has not issued a permit to convert or if the Mayor's Office of Housing has not found the hotel owner or operator has acted in good faith in seeking a project pursuant to subsections 41.13(a)(2) or (a)(5) or this subsection, no later than one hundred eighty (180) days following the effective date of this amended Chapter, or such later date as herein provided, this Subsection 41.13(d) shall no longer be applicable, City shall refund any amounts deposited as security pursuant to the terms herein, and such hotel owner or operator shall comply with all applicable terms of this Chapter.

(e) When a residential unit is approved for conversion to another use pursuant to the provisions of Subsection 41.13(a)(2), (a)(4) or (a)(5) above, such unit shall not be deemed to be reconverted into a residential unit regardless of any interim uses after payment as set forth in Subsections 41.13(a)(2), (a)(4) or (a)(5).

Sec. 41.14 Mandatory Denial of Permit to Convert

A permit to convert shall be denied by Superintendent of the Bureau of Building Inspection if:

(a) The requirements of Sections 41.12 or 41.13, above, have not been fully complied with;

(b) The application is incomplete or contains incorrect information;

(c) An applicant has committed unlawful action as defined in this Chapter within (12) months previous to the issuance for a permit to convert:

(d) The proposed conversion or the use to which the unit would be converted is not permitted by the City Planning Code.

Sec. 41.15 Approval and Issuance of Permit to Convert

The Superintendent of the Bureau of Building Inspection shall issue a permit to convert, provided that:

(a) The requirements of Section 41.12 have been met;

(b) Evidence of compliance with the requirements of Section 41.13 has been submitted. Satisfactory evidence of compliance may be:

(1) A certification of final completion or permit of occupancy on the replacement housing; or

(2) A receipt from the City Treasurer that the in-lieu payment determined by the Department of Real Estate has been received; and

(3) Evidence of compliance with the requirements of Section 41.17 herein.

(c) The proposed conversion or the use to which the unit would be converted is permitted by the City Planning Code.

(d) Concurrent with the issuance of a permit to convert, the Superintendent of the Bureau of Building Inspection shall issue a new certificate of use which shall state the newly certified number of residential units and tourist units.

No. 99-697

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CLAUDE LAMBERT and MICHELINE LAMBERT,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on Behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING; SAN FRANCISCO CITY ZONING ADMINISTRATOR; and BOARD OF PERMIT APPEALS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a heightened standard of review is applicable to the denial of a use permit application.

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INTRODUCTION

In a well-reasoned decision, the California Court of Appeal held that the San Francisco Planning Commission's denial of Claude and Micheline Lambert's request to convert 24 residential hotel units to tourist use did not effect a taking. Following unanimous authority, the Court of Appeal correctly applied the substantial evidence test to review the Commission's decision.

The Lamberts contend that review of the decision is necessary because the Court of Appeal did not subject the Planning Commission's decision to "heightened scrutiny." The Lamberts urge review based on two contentions: (1) heightened scrutiny is applicable because the Planning Commission demanded that the Lamberts pay a fee of $600,000 as a condition of granting the conversion permit, and the Commission denied the permit only after the Lamberts refused to pay the fee; and (2) the Court of Appeal's opinion conflicts with other decisions as to the applicability of the heightened scrutiny standard. Neither of these claims has merit.

The Lambert's first ground for review relies on a misstatement of the facts. The Planning Commission *did not* demand that the Lamberts pay a mitigation fee in any amount. Nor did the Planning Commission deny the Lamberts' permit because the Lamberts would not pay a fee. The record clearly shows that the Planning Commission denied the conversion to tourist hotel use in order to preserve San Francisco's supply of affordable housing, preserve neighborhood character, and to prevent traffic congestion. Accordingly, the Lamberts' ground for grant

of a writ of certiorari is not factually supported by the record.

The Lambert's second ground for granting a writ must be rejected because there is no conflict between the decision of the California Court of Appeal and this Court as to the conditions under which heightened scrutiny is applied. The decision is consistent with this Court's opinions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those decisions, this Court found that a heightened standard of review is applicable only if the government attempts to leverage its police power by exacting an interest in real property as a condition of approval of a development permit. No such condition was imposed in this case. In fact, the government *denied* the permit. In *City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999), this Court explicitly declined to extend the heightened standard of review from *Nollan* and *Dolan* to the denial of a permit. This Court has also declined to extend the heightened standards of review articulated in *Nollan* and *Dolan* to the imposition of a monetary fee. The California Court of Appeal decision in this case comports with the law of this Court.

The petition for certiorari should be denied.

STATEMENT OF FACTS

As they did in the trial court and the California Court of Appeal, Petitioners Claude and Micheline Lambert ("Petitioners" or "Lamberts") misstate and manipulate the facts to force this case into a heightened scrutiny

analysis. The Lamberts intentionally confuse the City Planning Code with the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO").[1] The Planning Code and the HCO are separate. Two different City agencies, the City Planning Commission and the Department of Building Inspection ("DBI"), respectively, administer these ordinances. Although the two agencies operate independently, the Lamberts falsely attribute the actions of the DBI to the Planning Commission.

The Lamberts challenge only the decision of the Planning Commission to deny a conditional use permit. However, in representing the facts to this Court, the Lamberts alternate between the Planning Commission's administration of the Planning Code and the DBI's administration of the HCO, without acknowledging that the two proceedings were unrelated. This questionable tactic is designed to create the impression that a single City agency, the Planning Commission, "bargained" with the Lamberts over a mitigation fee. To the contrary, the record shows that the Planning Commission's ultimate decision on the Lamberts' application was not in reaction to an unsuccessful attempt to impose a fee.

The Lamberts also misrepresent the Court of Appeal's holding. The Lamberts contend: "[T]he court of appeal held that heightened scrutiny is not applicable when a permit is *denied* for nonpayment of the suspect fee." Petitioners' Petition for Writ of Certiorari ["Pet. for Cert."] at 2, emphasis in original. The Court of Appeal

[1] The full text of the HCO is set forth in Respondent's Appendix at pages 77 through 103.

did not find that the Planning Commission denied the permit "for nonpayment of a fee." Instead, that Court held that heightened scrutiny was not applicable because the Planning Commission denied the permit for legitimate planning reasons. Pet. for Cert. App. A-6 to A-8 ("San Francisco took neither $600,000 nor a permitted use from Lambert . . . [thus] our task is to determine whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision").

In addition, even if the City had unsuccessfully attempted to impose a fee, this Court has not extended the *Nollan/Dolan* heightened standard of review to apply to the denial of any permit or to fees imposed as a condition of development.

I. THE CITY PLANNING CODE AND MASTER PLAN.

San Francisco's Planning Code contains the City's zoning ordinances. In addition to the Planning Code, the City has adopted a general plan, known as the Master Plan, which contains San Francisco's land use policies. The Planning Code prescribes mandatory rules for development; the Master Plan guides the Planning Commission's exercise of discretion in reviewing individual development applications for compliance with the Planning Code.

The Planning Code and Master Plan make the preservation of affordable housing a high priority. S.F. Planning

Code § 101.1(b)(3).[2] Specifically, the Master Plan advises against conversion of rental housing to tourist hotel use. S.F. Master Plan, Residence Element, Objective 3, Policies 5, 7. The Planning Code and Master Plan also mandate preservation of existing housing and neighborhood character. Planning Code § 101.1(b)(2) and (3).

The Planning Code limits the use of residential hotel units for tourist use. Under Planning Code Section 209.2, an owner of a residential building located in a residential zoning district is required to obtain a conditional use permit to convert the building to a commercial use such as a tourist hotel.

The Planning Commission administers the Planning Code and Master Plan. S.F. Charter §§ 3.524, 7.500, 7.501; Planning Code § 101.1. In order to rent residential hotel rooms to tourists on a permanent basis, the owner of a residential hotel located in a residential zoning district must obtain a conditional use permit from the Planning Commission in compliance with Section 209.2(e) and the City's Master Plan. Respondent's Appendix ("RA") 128-30, 155-60.

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[2] The sections of the San Francisco Planning Code, Charter and Master Plan cited in this petition are set forth in the Statutory Appendix to Respondent's Brief on the Merits in the California Supreme Court.

II. THE RESIDENTIAL HOTEL CONVERSION ORDINANCE.

In 1979 the City adopted a moratorium on the conversion of residential hotel rooms to tourist use. HCO § 41.3(d). In 1981, the City adopted the HCO:

> to benefit the general public by minimizing adverse impacts on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.

HCO § 41.2. The City designed the HCO to balance the needs of residential hotel owners to rent rooms to tourists during the summer months when tourist traffic is the heaviest, against the need to preserve San Francisco's existing housing supply. HCO § 41.3, RA 77-78.

The HCO took as its starting point the actual use of residential hotels on September 23, 1979; the HCO regulated changes in use after that date. HCO §§ 41.4(c), 41.6, 41.12, 41.13. Like most zoning controls, the HCO permits owners to continue the residential and tourist use in existence at the time of adoption of the HCO. *Id.*; *see also* HCO § 41.4(s). Thus, the HCO allows owners unlimited tourist use of rooms that were used for tourists in 1979. However, an owner may convert residential units to non-residential use only if the owner obtains a permit to convert by satisfying specified replacement housing conditions. HCO §§ 41.12, 41.13.

The restrictions on conversions of residential to tourist units under the HCO are separate and independent

from the restrictions on conversions of residential to commercial uses in the Planning Code and Master Plan. HCO § 41.4(s). The HCO is not a part of the Planning Code or Master Plan and is not enforced or administered by the Planning Commission. Rather, the HCO is set forth in the City's Administrative Code. RA 77. The DBI, formerly the Bureau of Building Inspection, enforces the HCO. HCO §§ 41.11, 41.14, 41.15.

III. THE CORNELL HOTEL.

The Lamberts are the owners of the Cornell Hotel, a 58-room property in San Francisco. On October 27, 1981, in compliance with the HCO, the Lamberts submitted an Initial Unit Usage Report to the DBI. RA 118-19. In the Report, the Lamberts stated that as of September 23, 1979, there were 31 residential units and 27 tourist units in the Cornell. *Id.* Based on the Report, on March 9, 1982, the DBI issued a Certificate of Use authorizing the operation of 31 residential units and 27 tourist units at the Cornell. RA 121-22. Although the HCO contains a procedure to appeal the DBI's determination (HCO § 41.6(f)), the Lamberts never filed an appeal. Thus, the Certificate of Use became final.

Eight years later, on May 11, 1990, the Lamberts filed an application under the HCO with the DBI to convert the 31 residential rooms in the Cornell to permanent tourist use. RA 157. In order to obtain a permit to convert, the HCO required that the Lamberts first satisfy the requirements of the Planning Code for a conversion to tourist use. RA 128-130; HCO § 41.14(d).

On June 15, 1990, the Lamberts filed an application for a conditional use permit with the Planning Department to convert the 31 residential units to tourist use under the Planning Code. RA 157. The Planning Department serves as the Planning Commission's staff.

On June 25, 1993, the Lamberts requested a formal determination from the Zoning Administrator of the Planning Department as to whether the Lamberts needed a conditional use permit to convert the 31 residential rooms to tourist use. RA 128.[3] The Lamberts contended that the 31 units designated as residential under the HCO were legal nonconforming commercial uses under the Planning Code. RA 157-36. A legal nonconforming use is one that was both legal and actual at the time the zoning law changes to make the use illegal. RA 160. The Lamberts contended that the 31 units were legally and actually tourist units in 1978 when the City amended the Planning Code to add Section 209.2 requiring a conditional use permit for a conversion of residential to tourist uses in the Cornell's zoning district. RA 157-58. By seeking a classification of the 31 units as a legal nonconforming commercial use, the Lamberts hoped to avoid the requirement that they secure a conditional use permit to convert the units. RA 157.

On August 12, 1993, the Zoning Administrator rejected the Lamberts' claim that the 31 units were a legal nonconforming commercial use. RA 128-30. The Zoning

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[3] The Zoning Administrator is responsible for interpretation and enforcement of the Planning Code only. S.F. Charter § 7.502. He or she is not responsible for enforcement of the HCO.

Administrator determined that the 31 units in the Cornell classified as residential under the HCO were also "group housing," a *residential* use for purposes of the Planning Code. *Id.* The Zoning Administrator based his determination, in part, on the Lamberts' own Initial Unit Usage Report filed in October 1981. *Id.* On August 23, 1993, the Lamberts appealed the Zoning Administrator's decision to the Board of Permit Appeals ("BPA"). RA 158.[4]

In January 1994, before the BPA ruled on the Lamberts' appeal of the Zoning Administrator's decision, for the first time the Planning Commission conducted a public hearing on the Lamberts' conditional use application to convert their 31 residential units to tourist's use. Appellants' Appendix ("AA") 97. In the Planning Department Case Report delivered to the Planning Commission before the hearing, the Planning Department staff informed the Planning Commission that the proposed conversion could lead to "the loss of affordable housing, [a] decrease in the City's housing stock, displacement and parking problems in the area." AA 202. The staff also advised that:

> under the policies and objectives of the Master Plan and the provisions of the City Planning

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[4] The BPA is a five-member commission established under the City's Charter to hear appeals from the decisions of the Zoning Administrator, the DBI, and other City officials regarding permits. S.F. Charter § 3.651. However, the BPA is not authorized to hear appeals from the decisions of the Planning Commission on conditional use permit applications. Planning Code § 308.1(a). Appeals from Planning Commission action on conditional use permits are to the City's Board of Supervisors, the legislative body. *Id.*

> Code, authorization of the requested Conditional Use can establish specific conditions (such as payment of a replacement or in-lieu fee) to mitigate any loss of housing which the Planning Commission finds is caused by this conversion.

AA 203.

The staff further advised that *if* the Planning Commission were to approve the application, the Commission had a range of options for requiring mitigation of the loss of housing resulting from the conversion. These options included: (1) no mitigation; (2) a mitigation fee based on formulas previously proposed by the Planning Department; (3) the fee required for a conversion under the HCO, or a variation of that fee; or (4) a requirement that the "loss to the City's housing stock . . . be fully mitigated." AA 203-04. The staff also noted that the Lamberts had proposed a mitigation fee of $100,000. Finally, the staff explained that the Lamberts had instituted a separate proceeding under the HCO in which a mitigation fee had been determined by formula. AA 206.

At all times, the Commission retained the authority to deny the application outright. The Report made "NO RECOMMENDATION" to the Commission as to approval of the application, approval with conditions, or denial. AA 203. The six options listed in the Report were for the Commission's consideration in the event that the Commission decided to approve the application.[5]

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[5] In asking this Court to infer that the Planning Commission denied the conditional use permit because the Lamberts refused to pay a fee greater than $100,000, the Lamberts contend that "denying the application outright was not an option under consideration," citing the Case Report. Pet. for Cert. at 5. The Lamberts mischaracterize the Case Report.

On March 17, 1994, the Commission held a second public hearing on the Lamberts' conditional use application. AA 97-105 (Plan. Comm'n Mot. No. 13659 ("Motion")). The Commission noted that one half of the guest rooms in the Cornell had been in residential use since the Lamberts took over operation of the hotel in 1966. AA 98-99. The Commission found that granting the permit "would result in a loss of the City's housing stock." AA 101.

The Commission discussed the options for mitigating the lost housing if the Commission were to approve the conditional use, including the "offer" by the Lamberts to pay a fee of $100,000. AA 100-02.[6] But the Commission ultimately rejected the mitigation options. Instead, the Commission elected to deny the permit based on three factors. AA 103-05. First, the Commission based its decision on policies in the Master Plan to "retain the existing supply of housing," "prohibit the conversion of rental housing to . . . hotel use," and "preserve the existing stock of residential hotels." AA 104-05.

Second, the Commission agreed with testimony that "the mixed uses found in this area contribute to a lively

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[6] The Commission merely noted that the fee required under the HCO would be $600,000. AA 100. Contrary to the Lamberts' claim (Pet. for Cert. at 17), the Commission did not determine that the Cornell was subject to the HCO or demand the fee due under the HCO. As stated above, the Commission has no authority to apply the HCO. *See supra* at 7.

neighborhood character and support local, neighborhood-serving businesses as well as tourist businesses." AA 102. The Commission found: "Maintenance of the current intensity of use of the property as a mixed residential and commercial building will be compatible with the residential neighborhood." AA 103. Accordingly, the Commission decided that denial of the permit was necessary to "preserve important housing resources near the downtown area," and to "provide for a more stable resident population." AA 103-04.

Finally, the Commission cited the increased traffic congestion that would result from a change in use:

> [C]onversion to an entirely tourist use could result in a substantial increase in the number of tour bus, taxicab and other forms of chartered transportation. The subject property, located on Bush Street, is on a major high volume one-way west to east traffic corridor serving passenger and commercial vehicles to the downtown area. Additional congestion caused by double parking and vehicle movements could impact traffic flow along Bush Street and adversely affect surrounding properties.

AA 104.

Contrary to the Lamberts' factual representations, which both the trial court and the Court of Appeal rejected, the Commission *did not* (1) determine that a mitigation fee of $600,000 would be an "appropriate" exaction; (2) demand that the Lamberts pay a mitigation fee of $600,000, or any other amount; (3) bargain with the Lamberts over the amount of a mitigation fee; or (4) deny

the permit because the Lambert's refused to pay a mitigation fee.

On June 1, 1994, the BPA held a public hearing on the Zoning Administrator's determination that the 31 residential units in the Cornell were classified as residential for purposes of the Planning Code. The BPA upheld the Zoning Administrator in part and overruled him in part. RA 155, 157-60. The BPA found that seven of the 31 units were legal nonconforming tourist uses under the Planning Code. RA 158-60. Accordingly, the Lamberts were not required to secure a conditional use permit to convert those seven units to tourist use under the Planning Code. The BPA also found that 24 of the 31 units were not legal nonconforming tourist uses. Thus, the BPA affirmed the Zoning Administrator's decision that the Lamberts were required to secure a conditional use permit to convert the 24 units. *Id.*[7]

Under the HCO, if the Planning Commission denies a permit to convert to a new use, the DBI must also deny a permit. HCO § 41.14(d), 41.15(c) (denial of conversion permit under HCO mandatory if new use not permitted by the Planning Code). Thus, because the Planning Commission denied the Lamberts' conditional use permit to operate the 24 units as a permanent tourist hotel under

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[7] Despite the BPA's earlier decision that seven of the 31 residential units were exempt from the conditional use requirement under the Planning Code, the DBI required the Lamberts to obtain a conversion permit under the HCO to convert those seven units to tourist use. AA 439. In a later proceeding, however, the BPA allowed the conversion of the seven units without compliance with the HCO. RA 165.

the Planning Code, the DBI also had to deny the Lamberts' application to convert the 24 units under the HCO. *Id.*

REASONS FOR DENYING THE WRIT

The primary dispute in this case is a factual one. The Lamberts' entire case rests on the faulty premise that the San Francisco Planning Commission demanded a cash payment of $600,000 in exchange for a conditional use permit. As the trial court and the California Court of Appeal found, the Planning Commission did not demand such a fee. Instead, the Planning Commission denied the Lamberts' permit based on several legitimate and well-articulated planning concerns. The legal issues presented by Petitioners are not presented by the record of this case. This Court should deny the Lamberts' petition for writ of certiorari.

I. THE PETITION IS PREMISED ON A FAULTY ASSUMPTION; THERE WAS NO UNSUCCESSFUL EXACTION OF A FEE AS A MATTER OF FACT.

The California Court of Appeal correctly held that the Planning Commission did not demand that the Lamberts pay a fee as a condition of approval of the Lamberts' permit. The premise on which the Lamberts base this Petition is wrong. In an attempt to shoe-horn this case into the heightened scrutiny standard established by *Nollan*, 483 U.S. 825 and *Dolan*, 512 U.S. 374, the Lamberts distort and manipulate the facts into a plot by "cash hungry regulatory agencies" to shatter the holding of this

Court in *Nollan*. Pet. for Cert. at 21. Aside from the plain error of such rhetorical accusations, the Lamberts urge this Court to review a legal issue that is not presented by the record. Further, they ask this Court to decide this phantom legal issue based on facts that were *rejected* by the lower courts and that have no support in the record.

The Lamberts allege that the Planning Commission denied a conditional use permit in response to the Lamberts' "refusal to comply with a demand for a cash payment of $600,000 in exchange for the permit." Pet. for Cert. at 2. This statement is simply untrue. The Planning Commission never required the Lamberts to pay $600,000 to convert the 24 units. On the contrary, Planning Commission Motion 13659 states that the Lamberts' application was *disapproved* because the conversion of residential hotel units to permanent tourist use would deplete the City's supply of housing, adversely affect the character of the neighborhood, and increase traffic congestion on a major thoroughfare. AA 103-05. The Court of Appeal recognized that the Lamberts' misrepresent the record. The court stated:

> Although Lambert contended in the trial court, and contends here, that the issuance of the conditional use permit was conditioned on his compliance with the one-for-one provisions of the HCO, *this contention misstates the facts.* The Planning Commission's decision to deny Lambert a conditional use permit was made not under the HCO, but under the authority of the Planning Code. Under that authority, the Planning Commission denied him a conditional use permit altogether. . . . *San Francisco did not demand*

> *anything from Lambert as a condition of a use permit*. It simply denied the permit outright. That the Planning Commission might have granted the permit upon payment of $600,000 does not make its refusal to issue the permit into a taking. . . . In short, as neither a property right nor money was in fact taken from Lambert, there is no reason to determine if a taking would have occurred had Lambert been required to pay $600,000 as a condition of a use permit, and thus there is nothing requiring review under the *Nollan/Dolan/Ehrlich* standard.

Pet. for Cert. App. A-11–A-12, emphasis added.

The Lamberts erroneously assert that the Planning Commission attempted to require the Lamberts to pay the fee due under the HCO. But the Planning Commission has no authority to enforce the HCO. It has independent authority entirely unrelated to the HCO to impose mitigation conditions on permits. *See Guinnane v. San Francisco City Planning Com.*, 209 Cal.App.3d 732, 737-38 (1989) ("The basic standard guiding the planning commission in discharging its function is the promotion of the 'public health, safety, peace, morals, comfort, convenience and general welfare.' ") (citing *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 311 (1943).

There is no evidence in the record that the Commission demanded the HCO fee, a higher fee than the fee the Lamberts offered, or any fee at all, or that the Lamberts refused to pay a higher fee. In its Motion, the Planning Commission merely noted that the Lamberts had "offered" to pay $100,000 for a conditional use permit. AA 100. Nor did the Lamberts submit any evidence that

there was any bargaining between the Lamberts and the Planning Commission over a fee.

If the Lamberts had any evidence of such bargaining, they were required to submit it to the trial court in opposition to the City's motion for summary judgment.[8] If such evidence existed, the Lamberts could simply have presented a declaration to the trial court attesting to the particular circumstances of the Planning Commission's "demand" or the Lamberts' "refusal." Alternatively, the Lamberts could have cited to the record of the Planning Commission proceedings. Because the Lamberts failed to present any such evidence, the trial court found that no "unsuccessful exaction" occurred. The Court of Appeal upheld this determination. The City submits that the Supreme Court is limited by the factual determination of the trial court, which was affirmed by the Court of Appeal. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) (deferring to state trial court's findings of fact in connection with federal constitutional claim); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (findings of fact should not be set aside unless clearly erroneous). To find the unsuccessful exaction that Petitioners urge, this Court would not only have to decide that the trial court erred in its fact-finding role, but it would also have to search (in vain) outside of the existing record.

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[8] To oppose the City's motion for summary judgment, the Lamberts had the burden to present sufficient evidence to raise a triable issue. Cal. Code Civ. Proc. § 437c(o)(2).

The Lamberts' claim that the Planning Commission demanded a fee of $600,000 rests on a serious mischaracterization of two distinct legislative processes – the Planning Commission's application of the Planning Code and the DBI's application of the HCO. The Lamberts, blurring the distinction between these two things, refer to "the Planning Commission" where the record shows the Commission acted, but shifts to "the City's staff" and "the City" where the DBI or the BPA was the decisionmaker. By stringing together events taken out of context, the Lamberts create the impression that the Planning Commission bargained with the Lamberts over a fee. In fact, these actions were unrelated.[9]

For example, citing to "AA at 344-45," the Lamberts allege: "The City invited the Lamberts to engage in further monetary negotiations for the permit and subsequently cited the Lamberts' refusal to engage in further haggling as evidence supporting the denial of their application." Pet. for Cert. at 6. But Appellants' Appendix 344-45 refers to a hearing of the BPA on March 22, 1995. That hearing concerned the BPA's application of the HCO to the seven units that the Lamberts ultimately were

[9] In one particularly creative passage of their "Statement of the Case," the Lamberts begin a paragraph referring to the Planning Commission. Pet. for Cert. at 5. In the first sentence of the next paragraph, they use the term "the City," but are in fact referring to the DBI's establishing the replacement housing fee under the formula in the HCO, which occurred two years earlier. Pet. for Cert. at 5-6; AA 179-80. In the next sentence, the Lamberts jump back to the Planning Commission. Pet. for Cert. at 6. But in the next sentence after that, they leap forward to a BPA hearing one year later. *Id.* In the next paragraph, they shift once again to DBI's determination several years earlier. *Id.*

allowed to convert to tourist use. The BPA held the hearing one year after the Planning Commission acted. The issues in that hearing had no connection whatsoever to the Planning Code or to the 24 units in controversy here. By referring to "the City" and failing to note that the Planning Commission had no further involvement with the Cornell, or that a year had passed, the Lamberts' petition makes it appear as if the Planning Commission negotiated with the Lamberts.[10]

II. EVEN IF THE CITY HAD UNSUCCESSFULLY ATTEMPTED TO IMPOSE A FEE, THE COURT OF APPEAL DECISION IS CONSISTENT WITH THIS COURT'S HOLDINGS.

In its most recent case on the application of the "essential nexus" and "rough proportionality" tests established in *Nollan* and *Dolan*, this Court declined to apply the heightened standard of review to a permit denial.[11] *Del Monte Dunes*, 119 S.Ct. at 1635. It should not do so now. Further, even assuming that the City had

[10] The Lamberts further allege: "The City sought to avoid [exposing its exaction to heightened scrutiny] by shrewdly withholding the permit until the $600,000 was in hand. When the Lamberts balked at paying the unconstitutional exaction, the City simply denied their permit outright." Pet. for Cert. at 20, footnote omitted. The Lamberts entangle themselves in their own logic. The Planning Commission could not expect to "increase its revenues to the tune of $600,000" (Pet. for Cert. at 24) by *denying* the permit, in which case the Commission would insure that the City received no revenue.

[11] For consistency, we will refer to the "essential nexus" test of *Nollan* and the "rough proportionality" test of *Dolan* together as the *Nollan/Dolan* heightened standard of review.

demanded that the Lamberts pay a fee as a condition of approval, this Court has not extended the *Nollan/Dolan* heightened standard of review beyond legal challenges to permit conditions that involve physical occupations of private property. It should not do so now. The California Court of Appeal correctly reviewed the case under a rational basis standard of review. *See* Pet. for Cert. App. A-8; *see also Dolan*, 512 U.S. 392 n.8 (in reviewing generally applicable land use regulations, burden is on party challenging regulation to prove arbitrary regulation of property rights) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

A. This Court Has Never Applied A Heightened Standard of Review To The Denial of a Permit.

In this case, the Planning Commission *denied* the Lamberts' permit. Contrary to Petitioners' claim, in *Del Monte Dunes* this Court stated explicitly that the *Nollan/Dolan* heightened standard of review does not apply to denials of permits. 119 S.Ct. at 1635. Further, this Court has affirmed local governments' broad authority to deny land use applications based on the effects of the proposed use, precluding any suggestion that the standard of review for regulatory actions applies in cases not involving any actual exaction. *See Nollan*, 483 U.S. at 835-36.

Petitioners also err when they assert that "there is now a conflict between the state and federal courts in California on this important question of federal constitutional law." Pet. for Cert. at 11. Indeed, this Court *overruled* the Ninth Circuit's decision in *Del Monte Dunes*, in so far as it applied the *Nollan/Dolan* heightened level of

scrutiny to the government's denial of a development permit. 119 S.Ct. at 1635. In deciding this case, the California Courts do not disagree with this result and have also found that *Nollan/Dolan* does not apply to denials of permits.

Del Monte Dunes undermines both Petitioner's argument that there is any conflict between the courts and that the *Nollan/Dolan* heightened standard of review should be applied to permit denials in the regulatory takings context. 119 S.Ct. at 1635. This Court in *Del Monte Dunes* unanimously overruled the Ninth Circuit's decision to apply *Dolan's* rough proportionality test in reviewing a decision by the City of Monterey to deny a development permit. *Id.* Justice Kennedy, writing for the Court, explained that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." *Id.* The test, Justice Kennedy wrote, "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development." *Id.* Accordingly Justice Kennedy concluded, "[t]he rough proportionality test of *Dolan* is inapposite to a case such as this one." *Id.*[12]

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[12] Justice Souter, writing for four justices and concurring with Justice Kennedy's position, wrote, "I agree in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally." *Del Monte Dunes*, 119 S.Ct. at 1650 (Souter, J., concurring in part and dissenting in part). Justice Scalia, writing separately, also concurred in the portion of Justice Kennedy's opinion quoted above. *Id.* at 1645. Accordingly, this Court's position on the narrow scope of the *Nollan/Dolan* heightened standard of review is unanimous.

While this Court did not expressly address the scope of the *Nollan* essential nexus test, the Court's analysis in limiting the application of the *Dolan* test would logically apply to *Nollan* as well.[13]

Again, Petitioners err on the facts. As is plain from the Planning Commission's Motion, the Commission did not deny the permit because the Lamberts refused to pay a $600,000 fee. Indeed, there is no mention of a replacement housing fee anywhere in the Commission's statement of its reasons for denying the permit. Rather, the Commission disapproved the Lambert's application because the proposed change in use failed to comply with the City's Master Plan and Planning Code. As the Court of Appeal said:

> Lambert, however, argues there is a triable issue of fact as to whether a taking occurred because the record contains evidence that San Francisco would have granted the conditional use permit had he agreed to pay $600,000. The issue here, however, is not whether a taking occurred, because San Francisco took neither $600,000 nor a permitted use from Lambert. It simply denied him a conditional permit to exploit a property interest. The question is whether San Francisco denied the permit for improper reasons. The Planning Commission found that the proposed

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[13] Petitioners attempt to make an argument that *Nollan* could apply even when the "majority opinion did not endorse the applicability of *Dolan's* rough proportionality test in this context . . . " in *Del Monte Dunes*. Pet. for Cert. at 26. *Dolan*, however, is founded on the *Nollan* opinion. The two opinions, applied together, define the law of regulatory takings in the case of legal challenges to cases requiring dedications of property.

> conversion would not provide a development that is necessary or desirable for, and compatible with, the neighborhood and community.

Pet. for Cert. App. A-7–A-8.

The Lamberts have no constitutional right to approval of the *new* use for which they applied. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-26 (1978), *Agins v. City of Tiburon*, 447 U.S. 255, 261-63 (1980). Thus, the Planning Commission's action was a routine refusal to allow a change in land use, similar to a disapproval of an application to rezone property to a higher use. As such, it is reviewed under the more deferential test applicable to ordinary land use regulation.

B. This Court Has Declined to Extend The Heightened Standard of Review to Fees Imposed in the Permitting Process

The *Nollan/Dolan* heightened standard of review is logically confined to the context of regulatory exactions involving public occupation of private property. Both cases involved regulatory takings challenges to permit conditions that effected a permanent physical occupation of private property. *Dolan*, 512 U.S. at 379-81 (city mandated that owner of hardware store dedicate land for storm drainage system and provide public bike path and greenway); *Nollan*, 483 U.S. at 827-28 (California Coastal Commission demanded public access along ocean beach in front of a homeowners' private property). Petitioners wrongly assume that if the City had indeed demanded $600,000 as a permit condition, "the fee could have been successfully challenged under *Nollan*." Pet. for Cert. at 15-16.

This Court has declined to reach that conclusion. In fact, this Court has strongly indicated in its opinions in *Nollan* and *Dolan* and in its two recent decisions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) and *Del Monte Dunes*, 119 S.Ct. 1624, that the heightened level of review in *Nollan* and *Dolan* would not apply beyond cases involving conditions effecting a permanent physical occupation of private property.

The opinions in both *Nollan* and *Dolan* stress the Court's unique concern with government actions that deprive property owners of a portion of their land. This Court has emphasized time and again the special character of permanent physical occupations. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a regulation imposing a physical occupation of property results in categorical taking regardless of how little property is occupied).

The Court explained its reasoning in *Nollan* and *Dolan* in terms of this special character of permanent physical occupations and has accordingly required that these types of exactions will receive particularly stringent review under the Takings Clause. *See Dolan*, 512 U.S. at 385 (conditions at issue differ from ordinary land use regulations, including fact that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."), *Nollan*, 483 U.S. at 841 (court will be "particularly careful" in cases involving a requirement that an owner deed property because of the likelihood that the purpose of the exaction is "avoidance of the compensation requirement, rather than the stated police power objective"). The language in *Nollan/*

Dolan implies that impact fees and non-possessory development conditions are different and not subject to the *Nollan/Dolan* heightened standard of review.[14]

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) further undermines Petitioners' claim that the *Nollan/Dolan* heightened standard of review would apply to a fee as a condition on a development permit. There, this Court implied that the *Nollan/Dolan* heightened standard of review does not extend beyond cases involving a physical occupation of private property to cases involving other conditions such as fees. Five Justices of this Court agreed that the Takings Clause does not apply to government actions that simply impose a financial obligation upon the claimant. *Eastern Enterprises* thus implicitly overruled the California Supreme Court's ruling in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), that heightened scrutiny may apply where the public agency exacts a fee in an individualized case as a condition of approval of a development project. As described above, in *Del Monte Dunes* this Court also declined to extend the *Nollan/Dolan* standard of review to the general regulatory context. 119 S.Ct. at 1635.

In sum, contrary to Petitioners' unsupported assertions to the contrary, this case does not fit within this

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[14] *See also Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) ("Given the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the "essential nexus" and "rough proportionality" tests are properly limited to the context of development exactions. (citation omitted).")

Court's application of the *Nollan/Dolan* heightened standard of review.

CONCLUSION

The petition for writ of certiorari should be denied.

DATED: November 24, 1999

Respectfully submitted,

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No. 99-697

In the

Supreme Court of the United States

CLAUDE LAMBERT and MICHELINE LAMBERT,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on Behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING; SAN FRANCISCO CITY ZONING ADMINISTRATOR; and BOARD OF PERMIT APPEALS,
Respondents.

On Petition for Writ of Certiorari to California Court of Appeal for the First Appellate District

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, Petitioners Claude and Micheline Lambert respectfully reply to the Opposition to Petition for Writ of Certiorari (Opp.) filed by Respondents City and County of San Francisco, *et al.*, (City) on November 24, 1999.

INTRODUCTION

> [W]here the character of governmental action, on its face, can reasonably be said to be a "predatory regulatory practice," then the Court should move forcefully to deter acts of governmental tyranny by vigorously enforcing the takings clause.[1]

This case involves an unsuccessful attempt at regulatory extortion by the City and County of San Francisco, carelessly disguised by a ritualistic invocation of the police power. The official findings of the City's Planning Department describe an attempt to exact a $600,000 payment from Claude and Micheline Lambert in exchange for a permit allowing them to rent out vacant rooms in the Cornell Hotel. California Court of Appeal Appellant's Appendix (AA) at 91. The same official findings show that when the Lamberts refused to pay, and their counteroffer was deemed "not adequate," their permit was denied. AA at 105. The City itself has cited the Lamberts' refusal to engage in further financial haggling as a justification for the permit denial. AA at 344-45. Yet now the City demands that this Court--like the court below--avert its eyes, ignore the record of attempted extortion, and defer to the City's post-hoc, boilerplate rationalizations for its permit denial.

However, as the Opposition Brief itself demonstrates, deference in this case would spell the end of this Court's landmark decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). If the heightened standard of review this

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[1] Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 Ark. L. Rev. 65, 94-95 (1991) (citations omitted).

Court mandated in *Nollan* is to have any effect in deterring predatory regulatory exactions, it must be applied in situations such as the one at bar. Otherwise, meaningful review of unconstitutional exactions will be evaded by the simple expedient of demanding cash (or land) in advance, under threat of denial of discretionary land-use permits if the required payments are not made.

Under the decision below, by merely repositioning its exaction demand to precede the decision to grant or deny a discretionary development permit, the City can convert the heightened scrutiny required by *Nollan* into no scrutiny at all. The Opposition Brief invokes judicial deference in asking this Court to ignore both the record compiled in the administrative proceedings below and facts placed in evidence by the City itself at an earlier stage of this litigation. Yet if such extreme deference had been applied in *Nollan*, the unconstitutional exaction at issue in that case would unquestionably have been upheld. If the *Nollan* doctrine is to retain any vitality, it is essential for this Court to grant the Petition for Certiorari, reject the City's pleas for deference, and apply the heightened standard of review required by *Nollan*.

I

THE ONLY ISSUE PRESENTED BY THIS CASE IS WHETHER *NOLLAN'S* HEIGHTENED STANDARD OF REVIEW APPLIES TO A PERMIT DENIAL WHEN THE PERMITTING AGENCY HAS SOUGHT AND FAILED TO OBTAIN A SUBSTANTIAL FINANCIAL EXACTION IN EXCHANGE FOR THE PERMIT

A. There Is No Factual Dispute in This Case

The City seeks to avoid the issue presented in this case by pretending there is a factual dispute concerning the City's actions. Opp. at 2-3, 14-19. There is no such dispute. As was fully set forth in the Petition for Certiorari (Petition), the City

has deliberately sought to disguise its routine extortionary demands under the Hotel Conversion Ordinance (HCO) by involving multiple City agencies in the process of issuing permits to "convert" vacant rooms. *See* Petition at 4-5. It is clearly of no significance to property owners which department or officer of the City demands an extortionary payment in exchange for a discretionary permit (in this case the Department of Building Inspection), and which one denies the permit when the demand is not paid (in this case, the Planning Commission).

The record is clear that the various City agencies acted in close concert in this matter, with the extortionary demand made by the Department of Building Inspection actually recounted in detail in the Planning Department's statement of findings ultimately denying the Lamberts' permit! AA at 97-105. There is no basis in the City's Planning Code for applying different zoning classifications to different residential rooms in the same hotel, independent of the artificial distinctions drawn by the HCO. There is no basis for considering a $600,000 fee as "mitigation" for the issuance of conditional use permits, independent of the one-for-one replacement requirements of the HCO. To pretend that the actions of the city agencies implementing the provisions of the HCO were somehow independent and uncoordinated is simply subterfuge.

Most tellingly, the entire saga of the Lamberts' application, the City's demand for cash, the Lamberts' unsuccessful counteroffer, and the resulting denial of the permit is set forth in a single document: the Planning Commission's official findings relating to the disapproval of the Lamberts' permit. AA at 97-105. This document also establishes that permits identical to those the Lamberts sought are routinely granted in exchange for cash. AA at 102.

As Presiding Justice Strankman noted in his dissent below, the Planning Commission's findings by themselves are sufficient to document the concerted effort by the City's various departments to exact a $600,000 payment from the Lamberts in

exchange for discretionary development permits and to establish that the permits were denied because the cash was not forthcoming. Petition Appendix (App.) A-16-17 (Strankman, P.J., dissenting). The City's pretense that the actions of its constituent departments were somehow unrelated is just that--a pretense.

B. When a Discretionary Development Permit Is Denied Because a Landowner Refuses to Comply with an Unconstitutional Exaction, the Standard of Review Will Be Dispositive in Determining "What Happened"

The City's efforts to shroud its actions behind an interagency shell game inadvertently highlight the importance of the issue presented by this case, since whether a court allows itself to be taken in by such a subterfuge will depend entirely on the level of scrutiny that is brought to bear.

In his dissenting opinion below, Presiding Justice Strankman recognized that a heightened standard of review must be applied in cases such as the one at bar if this Court's *Nollan* decision is "to achieve [its] legal aim." App. A-20 (Strankman, P.J., dissenting).

> To believe otherwise is to believe a regulatory agency can evade the constitutional safeguard of heightened scrutiny by a shrewd repositioning of its exaction demands.

App. A-21. The City's Opposition Brief demonstrates the wisdom of Justice Strankman's analysis. The City's defense consists of little more than thinly disguising its extortionary demands with an interagency shell game, Opp. at 14-19, and then insisting that this Court (and all courts) must adopt a policy of extreme deference in reviewing the City's actions. Opp. at 19-26. If this level of deference had been applied to the beach access exaction in *Nollan*, that demand would unquestionably have been upheld. The only significant difference between the

Nollan exaction and the $600,000 payment demanded of the Lamberts was one of timing. Under the argument now advanced by the City, if the California Coastal Commission had demanded that the Nollans sign over an easement before the Commission decided the fate of their permit application, that exaction would have completely evaded judicial review. Either the easement would have been dedicated to the state (and the Nollans would have been forced to waive their right to challenge it, as the City requires of owners who pay the HCO fee); or the permit would have been denied on boilerplate grounds such as those recited by the City in the present case. Either way, an exaction rightfully requiring heightened scrutiny would evade meaningful judicial review--unless this Court agrees that *Nollan* must be applied to "repositioned" exactions such as the one in the case at bar.

This point is driven home by the City when it argues that denying the Lamberts' permit could not have been motivated solely by the City's interest in increasing its revenues, since the denial "would insure that the City received no revenue." Opp. at 19 n.10. Of course, this overlooks the cautionary effect the denial of the Lamberts' permit was expected to have on the owners of the other 527 properties singled out for extortion by the HCO. As the Planning Commission pointedly spelled out in its findings, owners who pay what the City demands get their permits (AA at 102)--and those who don't, don't. AA at 105.

If the City succeeds in the transparent subterfuge documented by the record below, the protections established by this Court in *Nollan* will be nullified by little more than a snicker and a wink. Productive, law-abiding citizens like Claude and Micheline Lambert deserve better of their government and their courts.

II

THE SHARP DISAGREEMENT BETWEEN CALIFORNIA'S STATE AND FEDERAL COURTS ON *NOLLAN'S* APPLICABILITY TO EXTORTIONARY PERMIT DENIALS WAS NOT RESOLVED BY *CITY OF MONTEREY*

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 1359 (1998), the Ninth Circuit Court of Appeals upheld a finding of a regulatory taking based in part on a determination that the denial of a discretionary land use permit did not substantially advance legitimate state interests, as required by *Nollan*. *Id.* at 1428. A comparison of this holding to the decision below demonstrates the stark contrast between California's state and federal courts on this important question of federal constitutional law. In its Opposition Brief, the City asserts that this conflict was resolved by this Court's opinion in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999), which supposedly "overruled the Ninth Circuit's decision in *Del Monte Dunes*," Opp. at 20, and "declined to apply the heightened standard of review to a permit denial." Opp. at 19. The City mischaracterizes the majority opinion in *City of Monterey* and now seeks to convince this Court that that opinion stands for precisely the opposite of what it actually says. Far from resolving the conflict between the California courts and the Ninth Circuit on *Nollan*'s applicability to extortionary permit denials, *City of Monterey* created a further conflict--the conflict between the holding of the court below and this Court!

As was fully set forth in the Petition for Certiorari, this Court in *City of Monterey* unequivocally affirmed the application of *Nollan's* heightened standard of review in the context of the denial of a development permit. 119 S. Ct. at 1636; *see* Petition at 25-26. Nevertheless, throughout its Opposition Brief the City persistently mischaracterizes *City of Monterey* as having reached

the opposite conclusion: "In [*City of Monterey*], this Court explicitly declined to extend the heightened standard of review from *Nollan* . . . to the denial of a permit," Opp. at 2; "[in *City of Monterey*], this Court declined to apply the heightened standard of review to a permit denial," Opp. at 19; "[in *City of Monterey*], this Court stated explicitly that the *Nollan* . . . heightened standard of review does not apply to denials of permits," Opp. at 20, etc. In short, the City has stood the *City of Monterey* opinion on its head, and now repeats it back to this Court for the very opposite of what the majority opinion actually held. Based on a decision holding that applying *Nollan's* "substantial advancement" standard to the denial of a development permit is "consistent with our previous general discussions of regulatory takings liability," 119 S. Ct. at 1636, the City implausibly argues that this Court rejected the applicability of *Nollan* in the context of permit denials!

Like its subterfuge concerning the record below, the City's misrepresentations concerning *City of Monterey* are easily exposed. The City has intentionally conflated two very different doctrines--the elevated "substantial advancement" standard of review from *Nollan* and the "rough proportionality" test from *Dolan v. City of Tigard*, 512 U.S. 374 (1994). By pretending that these distinct doctrines are identical, the City is able to misconstrue this Court's statements concerning *Dolan's* rough proportionality standard (*see City of Monterey*, 119 S. Ct. at 1635) as a rejection of *Nollan's* heightened scrutiny.

Ultimately, when forced to acknowledge that *Nollan* and *Dolan* enunciate two separate standards, the City's argument lapses into incoherence:

> *Dolan* . . . is founded on the *Nollan* opinion. These two opinions, applied together, define the law of regulatory takings in the case of legal challenges to cases requiring dedications of property.

Opp. at 22 n.13. This feigned inability to distinguish between two distinct legal standards laid down in two different opinions decided seven years apart may seem inconsequential. After all, there is no likelihood that this Court will be misled concerning its own pronouncements on regulatory takings standards. Unfortunately, however, the City is not alone in its studied misinterpretation of *City of Monterey*. The pretense that this decision somehow repudiated *Nollan's* heightened scrutiny in regulatory takings cases of all kinds has become a rallying cry of the regulatory defense bar throughout the United States. The resulting distortion of this Court's regulatory takings doctrine, as set forth in the following section, has created needless but widespread confusion concerning the proper applicability of the "substantial advancement" standard.

III

THE CITY'S MISREPRESENTATION OF THIS COURT'S RULING IN *CITY OF MONTEREY* IS PART OF A DISTURBING TREND TO DISTORT AND UNDERMINE THIS COURT'S REGULATORY TAKINGS JURISPRUDENCE THAT CALLS FOR FURTHER GUIDANCE FROM THIS COURT

In a recent article, one of the leading advocates of stringent governmental control over private property offered the same misinterpretation of *City of Monterey* to a national audience. *See* Robert H. Freilich and Jason M. Divelbiss, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371 (1999). Following the same moves as the City in its Opposition Brief, Prof. Freilich conflates *Nollan's* heightened standard of review and *Dolan's* rough proportionality standard into a nonexistent "*Nollan/Dolan*" standard, *id.* at 380. Then, because this Court rejected the applicability of *Dolan* to permit denials, Freilich is able to claim that *City of Monterey* establishes that *Nollan's* "intermediate standard of heightened scrutiny" is limited to "the narrow categorical exceptions of title or exaction takings." *Id.* at 380.

Ostensibly writing independently, a second pro-regulatory spokesman has recently advanced the same distorted reading of *City of Monterey*. Writing in the November, 1999, issue of the Environmental Law Reporter, regulatory advocate John D. Echeverria purports to find a rejection of *Nollan* via the following analysis:

> [*Del Monte Dunes'*] reading of *Dolan* also implicitly limits the scope of *Nollan*. In *Del Monte Dunes* the Court expressly discussed only the scope of the *Dolan* "rough proportionality" test. Thus, *Del Monte Dunes* could conceivably be read as not affecting the scope of the *Nollan* "nexus" test, as well as the heightened standard of review adopted in that decision. But if the "rough proportionality" test cannot logically be extended beyond the type of physical exactions at issue in *Dolan*, the same reasoning apparently requires that *Nollan*, which involved a physical occupation as well, be limited to the same extent. Thus, *Del Monte Dunes* appears to limit the scope of *Nollan* as well as *Dolan*.

John D. Echeverria, *Revving the Engines in Neutral: City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 29 Envtl. L. Rep. 10682, 10692 (Nov. 1999).

Thus, the fact that this Court's *City of Monterey* opinion expressly upheld the application of *Nollan's* heightened scrutiny by the trial court is simply swept aside by governmental advocates intent on undermining this Court's protections of individual rights under the Fifth Amendment. This concerted effort by pro-regulatory writers and practitioners has created widespread doubt and misunderstanding as to the current role of *Nollan's* heightened scrutiny requirement in this Court's takings jurisprudence. Leaving aside the source of the confusion, it is unfortunately true that both property owners and local governments must now ask: "How . . . are the lower federal and state courts to resolve takings claims based on a means-ends

theory until the [Supreme] Court finally provides more definitive guidance?" John D. Echeverria, *Revving the Engines in Neutral*, 29 Envtl. L. Rep. at 10692. The present case provides an ideal vehicle for this Court to provide much-needed elaboration. Further delay will only bring further confusion into the interpretation and application of the "substantial advancement" standard by state and federal courts throughout the Nation.[2]

CONCLUSION

For all the above reasons, and for the reasons stated in the Petition, the Petition for a Writ of Certiorari should be GRANTED.

DATED: December, 1999.

Respectfully submitted,

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[2] As this Reply was being drafted, the New York Court of Appeals handed down a decision incorporating the misinterpretation of *City of Monterey* urged by the authors quoted above. In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 1999 WL 1061494 (N.Y.), 1999 N.Y. Slip Op. 09833, New York's highest state court incorrectly held that *City of Monterey* rejected *Nollan's* heightened scrutiny requirement. *Id.* Thus, the state courts of New York and California stand in direct conflict with the Ninth Circuit and with this Court on this essential constitutional issue.

SUPREME COURT OF THE UNITED STATES

CLAUDE LAMBERT ET UX. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 99–697. Decided March 27, 2000

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting from the denial of certiorari.

Petitioners Claude and Micheline Lambert own the Cornell Hotel in San Francisco. The hotel has 24 residential units and 34 tourist units. After experiencing difficulty renting the hotel's residential units, petitioners applied to the San Francisco Planning Commission for a conditional use permit to convert those units to tourist use.* That request implicated two bodies of San Francisco's land-use law: the Planning Code and the Residential Hotel Unit Conversion and Demolition Ordinance (HCO). The Planning Code provides that a tourist hotel may not be "significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." S. F. Planning Code, Art. 1.7, §178(c) (2000). The HCO prohibits the issuance of a permit for the conversion of units from residential to tourist use unless the proprietor agrees to provide either one-to-one replacement for those units or to pay a portion of the replacement costs.

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*When petitioners first sought to convert their residential units to tourist use, the hotel contained 31 residential units. Petitioners were successful, however, in convincing the San Francisco Board of Permit Appeals to reclassify seven of those as tourist units, producing the hotel's configuration noted in the text.

See S. F. Admin. Code, ch. 41, §41.13 (2000).

Pursuant to the HCO, the city obtained two appraisals of the replacement costs for the units petitioners wished to convert. See 67 Cal. Rptr. 2d 562, 570 (1997) (Strankman, P. J., dissenting). The first appraisal was $488,584 and the second was $612,887; the city settled on $600,000. See *ibid.* Petitioners, however, offered only $100,000. See *ibid.* After the Planning Commission denied the permit application, petitioners brought the present suit. They contended that the replacement fee is unconstitutional under this Court's decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), which held that a burden imposed as a condition of permit approval must be related to the public harm that would justify denying the permit, and must be roughly proportional to what is needed to eliminate that harm. The California Court of Appeal affirmed the trial court's rejection of petitioners' claim. It held that the HCO played no part in the commission's decision, and therefore "San Francisco did not demand anything from [petitioners] as a condition of a use permit." 67 Cal. Rptr. 2d, at 569. Instead, the court maintained, the commission relied solely on the Planning Code and, basing its decision upon such traditional zoning concerns as compatibility with surrounding development, effect on traffic patterns, and availability of housing stock, "simply denied the permit outright." *Ibid.* Because, the court continued, "neither a property right nor money was in fact taken from [petitioners], there [was] no reason to determine if a taking would have occurred had [petitioners] been required to pay $600,000 as a condition of a use permit, and thus there [was] nothing requiring review under" *Nollan* and *Dolan*. 67 Cal. Rptr. 2d, at 569.

The record belies the Court of Appeal's claim that the commission ignored petitioners' refusal to meet its demand for a $600,000 payment. After acknowledging petitioners' offer of $100,000, the commission compared this figure with the amounts offered by two other hotels that had successfully requested similar conversions. 1 Appellants' App. in No. A076116 (Cal. Ct. App.), pp. 100, 102. It noted that in those two applications, the fee amounted to $10,000 and $15,000 per room, respectively. See *id.*, at 102. (The fee in petitioners' case, by contrast, amounted to only $3,226 per room. See 67 Cal. Rptr. 2d, at 571.) The commission then found that petitioners' application was "not comparable to those previously granted . . . ," because petitioners "failed to demonstrate that the amount offered" was "sufficient to mitigate the loss of housing stock." 1 Appellants' App., at 102. It is simply and obviously not true that the commission ignored petitioners' refusal to satisfy its fee demand.

The Court of Appeal itself, after asserting that "San Francisco did not demand anything" from petitioners, 67 Cal. Rptr. 2d, at 569, in the next breath found it "somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood *might have been overcome* by payment of [a] significant sum of money," *ibid.* (emphasis added). This observation makes no sense, of course, unless the court concluded from the record that the commission might have rendered a different decision if petitioners had been more generous. It sought to evade the natural consequence of that conclusion with the following unelaborated assertion: "That the Planning Commission *might have granted the permit* upon payment of $600,000 does not make its refusal to issue the permit into a taking." *Ibid.* (emphasis added).

There are three possible readings of the Court of Appeal's opinion. First, and most obviously, one might take at face value the court's factual finding that the fee played *no* role in the decision. That would be a gross distortion of the record.

Secondly, one might ignore the court's initial see-no-evil disclaimer, and assume that it accepted what the record

undeniably showed, that petitioners' refusal to meet the fee demand was a motivating force behind the commission's decision. On that assumption, the court's refusal to apply *Nollan* and *Dolan* might be thought to rest upon its determination that that factor was irrelevant, since the commission *also* relied upon ordinary criteria under the Planning Code. But it is *always* the case that if the permit applicant does not yield to the extortionate demand, the *ordinary* criteria will be invoked to deny his permit. If indeed unjustified denial can constitute a taking (the question presented by the third basis for the decision, discussed below), *Nollan* and *Dolan* can surely not be evaded by simply adding boilerplate "ordinary criteria" language to the denial. The increasing complexity of land-use permitting processes, and of the criteria by which permit applications are judged, makes an "ordinary criteria" claim almost always plausible. When there is uncontested evidence of a demand for money or other property—and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish *either* (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met. Cf. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977). The record (and the Court of Appeal's opinion) make clear that the latter cannot be established here.

Finally, and still on the assumption that the Court of Appeal acknowledged that petitioners' failure to accede to the fee demand was a motivating factor in the commission's denial, the court's refusal to apply *Nollan* and *Dolan* might rest upon the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met. See Cal. Rptr. 2d, at 569 (Strankman P. J., dissenting) (characterizing the majority's opinion in this fashion).

From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process "'an out-and-out plan of extortion,'" *Nollan*, 483 U. S., at 837 (quoting *J. E. D. Associates, Inc.* v. *Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14–15 (1981)). There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference. It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear. Whereas in *Nollan* there was arguably a completed taking of an easement (the homeowner had completed construction that had been conditioned upon conveyance of the easement), and in *Dolan* there was at least a threatened taking of an easement (if the landowner *had* gone ahead with her contemplated expansion plans the easement would have attached), in the present case there is neither a taking nor a threatened taking of any money. If petitioners go ahead with the conversion of their apartments, the city will not sue for $600,000 imposed as a condition of the conversion; it will sue to enjoin and punish a conversion that has been prohibited.

The first two of the conceivable bases for the Court of Appeal's decision are so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal. There is reason to believe that this may be more than a local and isolated phenomenon. See, *e.g.*, Delaney, Development Agreements: The Road from Prohibition to "Let's Make a Deal!" 25 Urb. Law. 49, 52 (1993) ("In addition to anti-development attitudes and vesting problems, property owners and developers are confronting decisions of state courts which either ignore or do not follow the 'essential nexus' standard set forth in *Nollan* v. *California Coastal Comm'n* to validate development exactions" (footnote omitted)); M. Berger, Recent Developments in the

Law of Inverse Condemnation, Q203 ALI–ABA Video Law Review Study 1, 4 (1991) ("Last year, we noted that the California appellate courts had reacted to the Supreme Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles*, (1987) 482 U. S. 304 and *Nollan v. California Coastal Comm'n* (1987) 483 U. S. 825 by seeking ways to evade their evident mandate, either procedurally or substantively"). Were they the only arguable bases for the decision I would favor summary reversal, and remand for conduct of the *Nollan-Dolan* analysis. The third basis, however, is at least a plausible one, and raises a question that will doubtless be presented in many cases. Though I am unaware of a conflict of authority on the precise point, the other grounds upon which the court relied entitle this case to our attention, and should overcome our usual preference for cases that present actual conflicts. I would therefore grant certiorari and schedule the case for argument.